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THE THIRTY-FIFTH YEAR OF THE WORLD COURT*

BY MANLEY O. HUDSON

During the year 1956, the International Court of Justice gave two Advisory Opinions to assist in the work of the United Nations. On June 1, 1956, it met a request from the General Assembly for an opinion on the *Admissibility of Hearings of Petitioners by the Committee on South West Africa*. On October 23, 1956, it responded to a request from the Educational, Scientific and Cultural Organization of the United Nations by giving an opinion on the *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization*. It also gave a series of orders, some of which denied the jurisdiction of the Court.

At the end of the year, the Court had before it an application of France against Norway concerning the *Case of Certain Norwegian Loans*, and an application of Portugal against India concerning the *Right of Passage Over Indian Territory*.

The death of Judge Hsu Mo called for an election to the unexpired part of his term of office.

A total of five declarations were registered with the Secretariat of the United Nations recognizing the jurisdiction of the Court: by Portugal (late in 1955), India, Federal Republic of Germany (limited to disputes under the Genocide Convention), The Netherlands, and Israel.

ADMISSIBILITY OF HEARINGS OF PETITIONERS BY THE COMMITTEE ON SOUTH WEST AFRICA

On December 3, 1955, the General Assembly of the United Nations adopted the following Resolution:

The General Assembly,

Having been requested by the Committee on South West Africa to decide whether or not the oral hearing of petitioners on matters relating to the Territory of South West Africa is admissible before that Committee [A/2913/Add.2],

Having instructed the Committee, in General Assembly resolution 749 A (VIII) of 28 November 1953, to examine petitions as far as possible in accordance with the procedure of the former Mandate System,

Requests the International Court of Justice to give an advisory opinion on the following question:

* This is the thirty-fifth in the writer's series of annual articles on the World Court, the publication of which was begun in this JOURNAL, Vol. 17 (1913), p. 15.

"Is it consistent with the advisory opinion of the International Court of Justice of 11 July 1950 for the Committee on South West Africa, established by General Assembly resolution 749 A (VIII) of 28 November 1953, to grant oral hearings to petitioners on matters relating to the Territory of South West Africa?"

The Registry of the Court was informed of this by a letter of December 19, 1955. On December 22, 1955, the Court gave an order¹ fixing February 15, 1956, as the date for the submission of statements by states and organizations. The United States and the Republic of China availed themselves of the opportunity to present written statements; the Government of India stated that its views had been indicated in the Tenth Session of the General Assembly.

The Court at first fixed March 15, 1956, for a hearing on this question; this was later changed to March 22, 1956, on which date the Court heard Sir Reginald Manningham-Buller, representing the Government of the United Kingdom and Northern Ireland.

The Advisory Opinion of the Court was given by thirteen judges, by eight votes to five, on June 1, 1956,² answering the question affirmatively.

The Court understood that the granting of oral hearings to petitioners related to persons who had submitted duly authorized written petitions to the Committee on South West Africa. The question then arose as to whether the request related to the authority of the Committee on South West Africa to grant all hearings in its own right, or only upon prior authorization of the General Assembly. The Court referred to the acceptance of the Court's Advisory Opinion of July 11, 1950,³ and to the action of the General Assembly establishing the Committee on South West Africa. This was a subsidiary organ of the General Assembly, which was to "examine . . . such information and documentation as may be available in respect of the Territory of South West Africa," to "examine . . . reports and petitions which may be submitted to the Committee or to the Secretary-General," and to "transmit to the General Assembly a report concerning conditions in the Territory. . . ." This organ is the Committee on South West Africa referred to in the question submitted to the Court for its opinion.

It appeared to the Court from Resolution 749 A (VIII) of November 28, 1953, that the Mandatory was refusing to assist in the implementation of the Advisory Opinion of the Court of July 11, 1950. It therefore

lacked both the Mandatory's comments on the petitions and the supplementary information which the Mandatory might have been expected to supply to the Committee directly or through its accredited representative.

While the question in terms referred to the grant of oral hearings by the Committee, the Court interpreted it as meaning whether it is legally open to the General Assembly to authorize the Committee to grant oral hearings to petitioners.

¹ [1955] I.C.J. Reports 131.

² [1956] I.C.J. Reports 23; 50 A.J.I.L. 954 (1956).

³ [1950] I.C.J. Reports 128; 44 A.J.I.L. 757 (1950).

In the operative part of the Advisory Opinion of July 11, 1950, it was said that South West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17, 1920, and that the Mandatory continues to have the obligations stated in Article 22 of the Covenant of the League of Nations. Hence, the obligations of the Mandatory continued unimpaired, with the difference that the supervisory functions previously exercised by the Council of the League of Nations are now to be exercised by the United Nations. The organ of the United Nations exercising these supervisory functions is legally qualified to carry out an effective and adequate supervision of the administration of the Mandated Territory.

In determining the question before it, the Court felt that it must have regard to the whole of the provisions of its Opinion of July 11, 1950, and to its general purport and meaning. In that Opinion, the Court made it clear that the obligations of the Mandatory were those which obtained under the Mandates System. This was why the Court said that "the degree of supervision to be exercised by the General Assembly should not exceed that which applied under the Mandates System." The general purport of the Opinion of the Court of July 11, 1950, was that

the paramount purpose underlying the taking over by the General Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa . . . was to safeguard the sacred trust of civilization through the maintenance of effective international supervision. . . .

The Permanent Mandates Commission of the League of Nations had under consideration for some time the question of the grant of oral hearings to petitioners. The Commission felt that in some cases this would be useful, and it laid the question before the Council of the League of Nations. There it was decided by the Council that "before taking action, it should consult the Mandatory Powers." This consultation did not produce results. The Council decided on March 7, 1927, "that there was no occasion to modify the procedure followed by the Commission." It proceeded to direct that copies of the resolution and of the report of the *Rapporteur* and of the replies of the Mandatory Powers should be transmitted to the Permanent Mandates Commission. The Council was quite competent to authorize the Permanent Mandates Commission to grant oral hearings to petitioners if it deemed it fit to do so. The conclusion was that it was "clear that oral hearings were not granted to petitioners by the Permanent Mandates Commission at any time during the regime of the League of Nations."

° The Court considered that its Opinion of July 11, 1950, does not support the position that the question should be answered in the negative. It was inadmissible to hold that the Permanent Mandates Commission did not have power to make the admissibility of hearings impossible. While the General Assembly could not enlarge its authority, it is clear that it must confine itself to the exercise of the authority conferred upon the supervisory organ. The General Assembly should carry out its super-

visory function with the same authority as the Council of the League of Nations.

The Court then dealt with the suggestion that the granting of oral hearings to petitioners would add to the obligations of the Mandatory. This position the Court was unable to accept:

Oral hearings in such cases might enable the Committee to submit its advice to the General Assembly with greater confidence. If as the result of the grant of oral hearings to petitioners in certain cases the Committee is put in a better position to judge the merits of petitions, this cannot be presumed to add to the burden of the Mandatory.

The Court then took up the suggestion that the degree of supervision should not exceed that which applied under the Mandates System. This could not have been the intention of the Court in giving its Advisory Opinion of July 11, 1950. The Court had not sought to impose on the General Assembly any rigid limitation. The particular question which had been submitted to the Court arose out of a situation in which the Mandatory maintained its refusal to assist in giving effect to the Opinion of July 11, 1950. This kind of situation was provided for in the Court's Opinion of 1950 that the degree of supervision to be exercised by the General Assembly "should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations."

The Court thought that it would not be inconsistent with its Opinion of July 11, 1950, for the General Assembly to authorize a procedure for the grant of oral hearings by the Committee on South West Africa to petitioners who had already submitted petitions, provided that the General Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of the Mandated Territory. •

Hence, the Court held, by eight votes to five,

that the grant of oral hearings to petitioners by the Committee on South West Africa would be consistent with the Advisory Opinion of the Court of 11 July 1950.

The dissenting opinion of Vice President Badawi and Judges Basdevant, Hsu Mo, Armand-Ugon, and Moreno Quintana, came to the conclusion that the criterion of compatibility with the Opinion of 1950 involves a reference to former practice. Since the Permanent Mandates Commission did not have recourse to the hearing of petitioners, this was deemed to rule out that possibility.

JUDGMENTS OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANISATION UPON COMPLAINTS MADE AGAINST THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

On November 25, 1955, the Executive Board of the United Nations Educational, Scientific and Cultural Organization adopted the following resolution requesting an Advisory Opinion of the Court:

The Executive Board,

Whereas, by its Judgments Nos. 17, 18 and 19 of 26 April 1955, and No. 21 of 29 October 1955, the Administrative Tribunal of the International Labour Organisation confirmed its jurisdiction in the complaints introduced by Messrs. Duberg and Leff and Mrs. Wilcox and Mrs. Bernstein against the United Nations Educational, Scientific and Cultural Organization,

Whereas Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation provides as follows:

"1. In any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.

2. The opinion given by the Court shall be binding."

Whereas the Executive Board, after consideration, wishes to avail itself of the provisions of the said Article,

Decides to submit the following legal questions to the International Court of Justice for an advisory opinion:

Having regard to the Statute of the Administrative Tribunal of the International Labour Organisation;

Having regard to the Staff Regulations and Staff Rules of the United Nations Educational, Scientific and Cultural Organization, and to any other relevant texts;

Having regard to the contracts of appointment of Messrs. Duberg and Leff and Mrs. Wilcox and Mrs. Bernstein:

I.—Was the Administrative Tribunal competent, under Article II of its Statute, to hear the complaints introduced against the United Nations Educational, Scientific and Cultural Organization on 5 February 1955 by Messrs. Duberg and Leff and Mrs. Wilcox, and on 28 June 1955 by Mrs. Bernstein?

II.—In the case of an affirmative answer to question I:

(a) Was the Administrative Tribunal competent to determine whether the power of the Director-General not to renew fixed-term appointments has been exercised for the good of the service and in the interest of the Organization?

(b) Was the Administrative Tribunal competent to pronounce on the attitude which the Director-General, under the terms of the Constitution of the United Nations Educational, Scientific and Cultural Organization, ought to maintain in his relations with a Member State, particularly as regards the execution of the policy of the Government authorities of that Member State?

III.—In any case, what is the validity of the decisions given by the Administrative Tribunal in its Judgments Nos. 17, 18, 19 and 21?

This resolution was drawn to the attention of the Court by a letter of November 30, 1955, filed in the Registry of the Court on December 2, 1955. On December 5, 1955, states and organizations were notified that the Court would be prepared to receive written statements from them, within a time limit fixed by an order at April 30, 1956;⁴ this date was later extended to July 1, 1956. Within this time, UNESCO had submitted a written statement, with an appendix containing the observations and information by counsel acting on behalf of the individuals interested; it submitted later supplementary observations within the time limit. Written statements were also submitted on behalf of the governments of the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Republic of China.

The Court, not holding any oral proceedings, gave an Advisory Opinion on October 23, 1956.⁵ It decided, by nine votes to four, to comply with the request for an Advisory Opinion. By ten votes to three, it answered the first question in the affirmative; by nine votes to four, it was of the opinion that the second question did not call for an answer by the Court; and by ten votes to three, it gave an answer to the third question, holding that the validity of the decisions given by the Administrative Tribunal in its Judgments Nos. 17, 18, 19 and 21 is no longer open to challenge.

The Court began its opinion by quoting Article XII of the Statute of the Administrative Tribunal applicable to UNESCO (not to be confused with the Administrative Tribunal of the United Nations), as follows:

1. In any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.

2. The opinion given by the Court shall be binding.

The Court then quoted paragraph 5 of Article II to which reference is made in Article XII as follows:

5. The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other intergovernmental international organisation approved by the Governing Body which has addressed to the Director-General a declaration recognising, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure.

Paragraph 7 of Article II was quoted as follows:

7. Any dispute as to the competence of the Tribunal shall be decided by it, subject to the provisions of Article XII.

⁴ [1955] I.C.J. Reports 127.

⁵ [1956] I.C.J. Reports 77.

UNESCO had recognized the jurisdiction of the Administrative Tribunal provided for in Article II, paragraph 5, of the Statute.

The facts underlying the complaints were essentially the same in the four cases, and one of them is used for reference. Mr. Peter Duberg, who had been appointed for a fixed term on June 22, 1949, and whose appointment was to expire on December 31, 1954, did not comply with an order which he received in February, 1953, prescribing procedures for certain information concerning United States citizens employed or being considered for employment in the Secretariat of the United Nations. In June, 1954, he had an invitation to appear before the Loyalty Board of the United States Embassy in Paris, which he refused for reasons of conscience on July 13, 1954. On July 6, 1954, the Director General of UNESCO had issued an Administrative Memorandum on the subject of renewing the appointments expiring at the end of 1954. On August 13, 1954, the Director General informed Duberg that he would not offer him a new appointment on the expiry of his contract. He made an unsuccessful application to the Director General to reconsider his decision, and thereafter appealed to the UNESCO Appeals Board. On November 2, 1954, the Appeals Board expressed the opinion that the decision of the Director General should be rescinded; on November 25, 1954, the Director General informed the Chairman of the Appeals Board that he was unable to act in accordance with its opinion. Duberg then appealed on February 5, 1955, to the Administrative Tribunal, which, on April 26, 1955, upheld its competence to hear the dispute and gave a judgment on the merits.

The Court was not called upon to express an opinion on the merits of that judgment, though one of the questions before it involved the validity of the decisions given by the Administrative Tribunal. It undertook to consider the question whether an opinion should be rendered as requested. The fact that the opinion of the Court was accepted as binding provided no reason why the request for an opinion should not be complied with.

The advisory procedure thus brought into being appears as serving, in a way, the object of an appeal against the four Judgments, seeing that the Court is expressly invited to pronounce, in its Opinion, which will be "binding," upon the validity of these Judgments.

The Court considered whether its Statute and its judicial character do or do not stand in the way of its responding to the request for an Advisory Opinion. The advisory proceedings instituted in the present case involve a certain absence of equality between UNESCO and the officials. The officials had no remedy against the judgments of the Administrative Tribunal. This does not constitute a bar to the present proceedings. The Court then proceeded to examine the inequality of the parties. In the case of UNESCO, no obstacle is constituted in this respect by the Statute and Rules of Court; in the case of the officials the position is different, but the difficulty was met by the procedure under which the observations of the officials were made available to the Court and by dispensing with oral proceedings.

In view of this there would appear to be no compelling reason why the Court should not lend its assistance in the solution of a problem confronting a specialized agency of the United Nations authorized to ask for an Advisory Opinion of the Court.

In the light of the circumstances, the Court considered that it should comply with the request for an opinion.

The Court then considered the first question which was put to it. It had to consider whether "before the Administrative Tribunal the officials concerned complained of the refusal to renew their fixed-term contracts." It had to determine whether the examination of the complaints fell within the jurisdiction of the Administrative Tribunal under Article II, paragraph 5, of the Statute of the Administrative Tribunal. The official must allege the non-observance of the terms or provisions referring to him, in Article II, paragraph 5. This article does not mean that a mere verbal reference to certain terms of provisions would establish the jurisdiction of the Administrative Tribunal. The Court considered that in the cases here in question the officials put forward an interpretation of their contracts and of the Staff Regulations to the effect that they had a right of renewal of their contracts.

The expression "terms of appointment" should be understood in relation to the attitude assumed in the matter by the Director General of UNESCO. These questions were sufficiently related to the interpretation of the contract of employment to permit a finding that they follow within the competence of the Tribunal. The Court was of the opinion that, in order to decide the competence of the Administrative Tribunal, it must consider the contracts not only by reference to their letter, but also in relation to the actual conditions in which they were entered into.

The practice of UNESCO was a relevant factor in the interpretation of the contract in question. The Court proceeded to consider the details of the practice, particularly having in view the difference between a renewal of an appointment and that of an applicant who is new to the staff of UNESCO.

The fact is that there has developed in this matter a body of practice to the effect that holders of fixed-term contracts, although not assimilated to holders of permanent or indeterminate contracts, have often been treated as entitled to be considered for continued employment, consistently with the requirements and the general good of the organization, in a manner transcending the strict wording of the contract.

While it is true that an applicant for a new appointment cannot properly invoke the jurisdiction of the Administrative Tribunal, the same cannot be said of an official who fails to obtain the renewal of his fixed-term contract. The complainants held "fixed-term contracts . . . renewable." There was no question here of a new contract unrelated to its predecessor. There was a legal relationship between the renewal and the original appointment. It follows that, whether looked at from the point of view of non-observance of the appointment or that of non-observance of Staff Regulations, the question was one of a "dispute concerning the interpretation and application of Staff Regulations and Rules" of the defendant Organiza-

tion. In consequence, the Tribunal was held to be justified in affirming its jurisdiction.

There are also other factors which bring the Administrative Memorandum within the terms of Article II, paragraph 5, of the Statute of the Administrative Tribunal. From this point of view, the allegation of non-observance of the Staff Regulations seems to fall within the jurisdiction of the Tribunal. The Court admitted that the Administrative Tribunal is an international tribunal, but one of limited jurisdiction.

As to Question II, the Court referred to Article XII of the Statute of the Administrative Tribunal. It provides for jurisdiction of a request for an Advisory Opinion of the Court "in two clearly defined cases." The first is that of the case where the Executive Board challenges a decision of the Tribunal confirming its jurisdiction. The request is not an appeal on the merits of the judgments, but it is limited to a challenge of the decision of the Tribunal. There is no reference in Question II either to a fundamental fault of procedure, or to the decision of the Tribunal confirming its jurisdiction.

The Court could not answer the question within the framework of Article XII of the Statute of the Tribunal. The Court found that the object of that question is outside the matter which, in the judgments which have been challenged, is germane to the jurisdiction of the Tribunal. It considered very scantily whether the validity of the judgments of the Tribunal was vitiated because it acted *ex aequo et bono*.

On Question III, the Court recalled that the four judgments had been challenged only in respect of the competence of the Administrative Tribunal. Since it rejected a contention of the validity of the jurisdiction, it decided to answer Question III by a finding in favor of the validity of the four judgments, that it was "no longer open to challenge."

Judges Winiarski, Klaestad and Sir Muhammad Zafrulla Khan gave separate opinions. President Hackworth, Vice President Badawi, and Judges Read and Córdova gave dissenting opinions.

This is a difficult opinion to handle. Unlike other Advisory Opinions, it cannot be so readily summarized. It is somewhat difficult to understand why Judges Winiarski, Klaestad and Sir Muhammad Zafrulla Khan accepted the opinion. The writer is disposed to question whether the opinion amounts to any contribution to the jurisprudence of the Court, though of course, under Article XII of the Statute of the International Labor Office Administrative Tribunal, it is binding on UNESCO.

CASE OF CERTAIN NORWEGIAN LOANS (FRANCE *v.* NORWAY)

This case was instituted by France against Norway by an application of July 6, 1955. The application refers to the acceptance of the compulsory jurisdiction of the International Court of Justice by the Kingdom of Norway on November 16, 1946, and to the acceptance of compulsory jurisdiction by the French Republic on March 1, 1949.

The case is based upon a certain number of international bonds, issued by Norway on the French market, and made payable in gold, or including

a gold clause, which are held by French nationals. Some of the loans were floated directly by the Kingdom of Norway, others through the intermediary of state banks, the Mortgage Bank of the Kingdom of Norway and the Small Holdings and Workers' Housing Bank, on various dates between 1885 and 1907. A Norwegian decree of September 27, 1931, suspended the convertibility of notes issued by the Bank of Norway, and since that date the bonds have been paid in Norwegian kroner only. The efforts of French holders to obtain resumption of payments in gold were unsuccessful, and in 1953 the French Government intervened on behalf of its nationals. Diplomatic negotiations in 1953 and 1954 yielded no results.

On September 19, 1955, the time limits were set for the filing of the Memorial and the Counter-Memorial in this case.⁶ On April 20, 1956, the last day for the filing of the Counter-Memorial of Norway, the Kingdom of Norway filed a preliminary objection to the jurisdiction of the Court, and contended that the claim was inadmissible. In view of the objection, the proceedings on the merits in the case were suspended. On April 24, 1956, the Court fixed June 4, 1956, as the time limit for a statement of the French Republic;⁷ this limit was later extended to August 31, 1956.⁸

On September 21, 1956, the Registrar informed the Agents that the Court had fixed October 15, 1956, as the date for the opening of the oral proceedings on the objection. On September 28, 1956, the Court joined to the merits the preliminary objections of Norway.⁹ By the same order, the Court fixed the following limits for the filing of further pleadings: for the Counter-Memorial of the Norwegian Government, December 20, 1956; for the Reply of the French Government, February 20, 1957; for the Rejoinder of the Norwegian Government, April 25, 1957.

RIGHT OF PASSAGE OVER INDIAN TERRITORY (PORTUGAL *v.* INDIA)

This case was introduced by Portugal against the Republic of India on December 22, 1955. The application refers to the recognition of the compulsory jurisdiction of the International Court of Justice by Portugal on December 19, 1955, and to the recognition of the jurisdiction of the Permanent Court of International Justice by India, of March 7, 1940, which was within the meaning of Article 36 (5) of the Statute of the International Court of Justice.¹⁰

The application of December 22, 1955, notified the Court of the appointment of M. F. Quartin de Oliveira Bastos, the Portuguese Minister to The Netherlands, as the Agent for Portugal. It was notified to India and acknowledged by it on January 12, 1956. By a letter of February 3, 1956, the Minister of External Affairs of India notified the Court of the appointment of Shri B. K. Kapur, Ambassador of India to The Netherlands, as Agent for India.

On March 13, 1956, the Court issued an order¹¹ fixing the following as

⁶ [1955] I.C.J. Reports 124.

⁷ [1956] I.C.J. Reports 18.

⁸ *Ibid.* 20.

⁹ *Ibid.* 73.

¹⁰ This declaration was terminated on Jan. 7, 1956. It would seem that this fact did not bear upon the Portuguese case.

¹¹ [1956] I.C.J. Reports 4.

the time limits for the filing of pleadings in the case: June 15, 1956, for the Memorial of the Government of the Republic of Portugal; and December 15, 1956, for the Counter-Memorial of the Government of the Republic of India. On November 27, 1956, the President of the Court decided "to postpone to April 15, 1957, the time-limit for the filing of the Counter-Memorial or of the Preliminary Objection of the Government of the Republic of India," and reserved the rest of the procedure.¹²

AERIAL INCIDENT OF MARCH 10, 1953 (UNITED STATES *v.* CZECHOSLOVAKIA)

This case was instituted by the United States on March 29, 1955,¹² when the Ambassador of the United States to The Netherlands filed in the Registry an application dated March 22, 1955. The application was duly notified to the Czechoslovak Government on March 29, 1955. Later it was submitted to the Members of the United Nations and to the other states entitled to appear before the Court.

The Czechoslovak Government, in a letter to the Registry on May 6, 1955, denied the jurisdiction. The Court found that it could not take any further steps upon this application, and its order of March 14, 1956, removed the case from the list.¹³

ANTARCTICA CASE (UNITED KINGDOM *v.* ARGENTINA)

On May 4, 1955, there was filed in the Registry of the Court an application by the Government of Great Britain and Northern Ireland, instituting proceedings over a dispute relating to the sovereignty over certain islands and lands in the Antarctic. On May 6, 1955, it was communicated to the Argentine Republic. It was later communicated to all Members of the United Nations and to the other states entitled to appear before the Court.

The Argentine Government, in a letter to the Registry of August 1, 1955, denied the jurisdiction of the Court. In these circumstances, the Court held that it had no jurisdiction. On March 16, 1956, the Court handed down an order that the case be removed from its list.¹⁴

ANTARCTICA CASE (UNITED KINGDOM *v.* CHILE)

This case was begun by the United Kingdom by an application on May 4, 1955. The application was submitted to the Chilean Minister for Foreign Affairs on May 6, 1955. Later it was communicated to the Members of the United Nations and to the other states entitled to appear before the Court.

In a letter to the Registry of the Court, dated July 15, 1955, and handed to the Registrar on August 2, 1955, the Chilean Minister to The Netherlands stated that it was not open to the International Court of Justice to exercise jurisdiction in this case. Under these circumstances, the Court found that

¹² [1956] I.C.J. Reports 170.

¹³ *Ibid.* 6.

¹⁴ *Ibid.* 12.

it had no jurisdiction, and that it could take no further steps upon the application. On March 16, 1956, it ordered that the case be removed from the list.¹⁵

AERIAL INCIDENT OF OCTOBER 7, 1952 (UNITED STATES *v.*
UNION OF SOVIET SOCIALIST REPUBLICS)

This case was instituted by the United States on June 2, 1955, by an application addressed to the Registry of the Court on May 26, 1955. The application was duly communicated to the Soviet Government on June 4, 1955. Later it was communicated to the Members of the United Nations and to the other states entitled to appear before the Court.

The Soviet Government, in a letter of August 26, 1955, denied that the Court had jurisdiction. The Court found that it was without any jurisdiction to handle this dispute, and that therefore it could take no further steps upon this application. Hence, on March 14, 1956, it issued an order to the effect that the case should be removed from the list.¹⁶

DEATH OF JUDGE HSU MO

Judge Hsu Mo died on June 28, 1956. He had been elected a member of the Court on February 6, 1946, and was re-elected in 1948 for nine years. The Dutch Government had expressed a desire to give him a state funeral; on account of the wishes of his family, he was given a private funeral. The ceremony took place on July 3, 1956, at the Peace Palace in The Hague.

Judge Hsu Mo was born at Soochow, China, on October 22, 1893. He was educated at Peiyang University, Tientsin, and at George Washington University. For a time he was Professor of International Law and International Relations at Nankai University, Tientsin. He was a Minister to Australia, and to Turkey. He assisted in the preparation of the Statute of the International Court of Justice of June 26, 1945. He was widely known for the great care of his consideration of the cases before the Court.

On September 28, 1956, the Court elected Judge Winiarski to replace the late Judge Hsu Mo as a member of the Chamber for Summary Procedure; and on the same date, it elected Judge Armand-Ugon to replace Judge Winiarski as a substitute member of the Chamber.

The General Assembly and the Security Council of the United Nations arranged to elect Judge Hsu Mo's successor in December of 1956. The General Assembly was joined for the election by representatives of Liechtenstein, San Marino and Switzerland. The election was begun on December 19, 1956, but it was not completed on December 31, 1956.

DECLARATIONS RECOGNIZING JURISDICTION

Portugal. On December 19, 1955, too late for inclusion in the writer's article for that year, the Ambassador of the Portuguese Government at Washington made the following declaration:

¹⁵ [1956] I.C.J. Reports 15.

¹⁶ *Ibid.* 9.

Mr. Secretary-General,

Under Article 36, paragraph 2, of the Statute of the International Court of Justice, I declare on behalf of the Portuguese Government that Portugal recognizes the jurisdiction of this Court as compulsory *ipso facto* and without special agreement, as provided for in the said paragraph 2 of Article 36 and under the following conditions:

(1) The present declaration covers disputes arising out of events both prior and subsequent to the declarations of acceptance of the "optional clause" which Portugal made on December 16, 1920, as a party to the Statute of the Permanent Court of International Justice.

(2) The present declaration enters into force at the moment it is deposited with the Secretary-General of the United Nations; it shall be valid for a period of one year, and thereafter until notice of its denunciation is given to the said Secretary-General.

(3) The Portuguese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification.

I avail myself of this occasion to present to you, Mr. Secretary-General, the assurances of my highest consideration.

(Signed) L. ESTEVES FERNANDES

The full powers were not deposited with the Secretary General of the United Nations until December 21, 1955.

Portugal had accepted the Optional Clause of the Permanent Court of International Justice on December 16, 1920, and it ratified the Protocol of Signature on October 8, 1921. There might have been a question whether the declaration of December 16, 1920, continued in force for Portugal.

On February 23, 1956, the Swedish Government wrote to the Secretary General of the United Nations that because of paragraph (3) of the Portuguese declaration, that government had really not accepted the jurisdiction of the Court. On May 23, 1956, the Registry of the Court informed the Members of the United Nations that the declaration was filed in the Registry. On July 5, 1956, the Deputy Permanent Representative of Portugal protested against the Swedish observation that paragraph (3) amounted to "no more than a form"; it was said that the Portuguese Government merely reserved "the right to abrogate at any time" their declaration of acceptance.

India. On January 7, 1956, the Permanent Representative of India to the United Nations gave a notice of termination of the declaration made on February 28, 1940, and deposited with the Secretary General of the League of Nations on March 7, 1940. The declaration was in force with reference to the International Court of Justice under Article 36, paragraph 5, of the Statute.

On January 7, 1956, also, the Permanent Representative of India made the following declaration to the Secretary General of the United Nations:

Excellency,

I have the honour, by direction of the President of India, to declare on behalf of the Government of India that, in pursuance of paragraph

2 of Article 36 of the Statute of the International Court of Justice, the Government of India recognize as compulsory *ipso facto* and without special agreement, on condition of reciprocity and only till such time as notice may be given to terminate this Declaration, the jurisdiction of the International Court of Justice in all legal disputes arising after the 26th January, 1950 with regard to situations or facts subsequent to that date concerning:

- (a) the interpretation of a treaty;
- (b) any question of International Law;
- (c) the existence of any facts which if established would constitute a breach of an international obligation; or
- (d) the nature or extent of the reparations to be made for the breach of an international obligation,

but excluding the following:—

- (i) disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;
- (ii) disputes with the Government of any country which on the date of this Declaration is a member of the Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree;
- (iii) disputes in regard to matters which are essentially within the domestic jurisdiction of India as determined by the Government of India; and
- (iv) disputes arising out of or having reference to any hostilities, war, state of war or belligerent or military occupation in which the Government of India are or have been involved.

I have the honour to be, with the highest consideration,

Your Excellency's obedient servant,

(Signed) ARTHUR S. LALL

Federal Republic of Germany. On May 7, 1956, the Federal Republic of Germany promulgated a resolution, which authorizes the following:

[Translation] Excellency,

With reference to the resolution adopted by the Security Council on 15 October 1946, I have the honour to make the following declaration on behalf of the Federal Republic of Germany:

The Federal Republic recognizes the jurisdiction of the International Court of Justice *ipso facto* and without special agreement in respect of all disputes which may arise between itself and any of the parties to the Convention on the Prevention and Punishment of the Crime of Genocide as provided for in Article IX of that Convention. This statement is made, however, subject to the condition of reciprocity.

This recognition of the jurisdiction of the International Court of Justice is effected in accordance with the Charter of the United Nations and in accordance with the terms and subject to the conditions of the Statute and Rules of the Court. The Federal Republic of Germany undertakes to comply in good faith with the decisions of the

Court and to accept all the obligations of a member of the United Nations under Article 94 of the Charter.

Accept, Excellency, the assurance of my high consideration.

For the State Secretary,
(Signed) BERGER

This was notified to the Members of the Court on June 12, 1956.

The Netherlands. On August 5, 1946, the Representative of The Netherlands to the United Nations made a declaration by which The Netherlands recognized the jurisdiction of the Court as obligatory; on August 1, 1956, the Acting Permanent Representative of the Kingdom of The Netherlands to the United Nations gave notice that the declaration of August 5, 1946, would expire on August 6, 1956.

On August 1, 1956, also, the Acting Permanent Representative of The Kingdom of The Netherlands to the United Nations promulgated a declaration, as follows:

[*Translation from the French by the Secretariat of the United Nations.*] I hereby declare that the Government of the Kingdom of The Netherlands recognizes, in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice, with effect from 6 August 1956, as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is on condition of reciprocity, the jurisdiction of said Court in all disputes arising or which may arise after 5 August 1921, with the exception of disputes in respect of which the parties, excluding the jurisdiction of the International Court of Justice, may have agreed to have recourse to some other method of pacific settlement.

The aforesaid obligation is accepted for a period of five years and will be renewed by tacit agreement for additional periods of five years, unless notice is given, not less than six months before the expiry of any such period, that the Government of the Kingdom of The Netherlands does not wish to renew it.

The acceptance of the jurisdiction of the Court founded on the declaration of 5 August 1946 is terminated with effect from 6 August 1956.

(Signed) E. L. C. SCHIFF

This declaration is interesting in that it refuses to follow the example of the United States in connection with the exclusion of domestic disputes.

Israel. Israel was a party to a declaration recognizing the jurisdiction of the Court for five years, deposited with the Secretary General of the United Nations on October 25, 1951.

On October 17, 1956, the Government of Israel deposited with the Secretary General of the United Nations the following declaration:

On behalf of the Government of Israel I declare that Israel recognizes as compulsory *ipso facto* and without special agreement, in relation to all other Members of the United Nations and to any non-member State which becomes a party to the Statute of the International Court of Justice pursuant to Article 93, paragraph 2, of the Charter, and subject to reciprocity, the jurisdiction of the International Court of Justice in accordance with Article 36, paragraph 2, of the Statute of

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the Court in all legal disputes concerning situations or facts which may arise subsequent to 25 October 1951 provided that such dispute does not involve a legal title created or conferred by a Government or authority other than the Government of Israel or an authority under the jurisdiction of that Government.

This Declaration does not apply to:

- (a) Any dispute in respect to which the parties have agreed or shall agree to have recourse to another means of peaceful settlement;
- (b) Any dispute relating to matters which are essentially within the domestic jurisdiction of the State of Israel;
- (c) Any dispute between the State of Israel and any other State whether or not a member of the United Nations which does not recognize Israel or which refuses to establish or to maintain normal diplomatic relations with Israel and the absence or breach of normal relations precedes the dispute and exists independently of that dispute;
- (d) Disputes arising out of events occurring between 15 May 1948 and 20 July 1949;
- (e) Without prejudice to the operation of subparagraph (d) above, disputes arising out of, or having reference to, any hostilities, war, state of war, breach of the peace, breach of armistice agreement or belligerent or military occupation (whether such war shall have been declared or not, and whether any state of belligerency shall have been recognized or not) in which the Government of Israel are or have been or may be involved at any time.

The validity of the present Declaration is from 25 October 1956 and it remains in force for disputes arising after 25 October 1951 until such time as notice may be given to terminate it.

IN WITNESS WHEREOF I, Golda, Meir, Minister for Foreign Affairs, have hereunto caused the Seal of the Ministry for Foreign Affairs to be affixed, and have subscribed my signature at Jerusalem this Twenty Eighth day of Tishri, Five Thousand Seven Hundred and Seventeen which corresponds to the Third day of October, One Thousand Nine Hundred and Fifty Six.

(Signed) Golda Meir

It is difficult to foresee any disputes which may be dealt with under this declaration.

MEMBERS OF THE COURT

At the present time, there are eighty Members of the United Nations which are Members of the Court. This is in view of the elections that were held in 1955 and 1956. In 1955, the following elections were held by the Security Council and the General Assembly of the United Nations:

Albania	Italy
Austria	Jordan
Bulgaria	Laos
Cambodia	Libya
Ceylon	Nepal
Finland	Portugal
Hungary	Rumania
Ireland	Spain

In 1956, the elections added to the Members of the United Nations:

Japan
Morocco

Sudan
Tunisia

The other states which are Members of the Court now consist of Liechtenstein, San Marino, and Switzerland. Therefore, the total of Members of the Court is now eighty-three. Of these, on July 15, 1956, the following twenty-three states were listed as parties to the compulsory jurisdiction of the Court:¹⁷

Australia
Canada
China
Colombia
Denmark
Dominican Republic
El Salvador
France
Haiti
Honduras
India
Israel
Liberia
Liechtenstein
Luxembourg
Mexico
Netherlands

New Zealand
Nicaragua¹⁸
Norway
Pakistan
Panama
Paraguay¹⁸
Philippines
Portugal
Sweden
Switzerland
Thailand
Turkey
Union of South Africa
United Kingdom
United States of America
Uruguay

¹⁷ I.C.J. Yearbook 1955-1956, p. 34.

¹⁸ See the relevant correspondence.

THE INTERNATIONAL RESPONSIBILITY OF THE UNITED STATES FOR VESTED GERMAN ASSETS

BY HENRY P. DEVRIES

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The organized pressures for return of vested enemy assets are accumulating. Acting in rhythm with "that cyclical movement of policy toward an enemy which history has made familiar,"¹ German interests directing their primary efforts toward the United States have received a sympathetic hearing from the Administration, and the Senate Committee on the Judiciary has approved proposed legislation which, if adopted, would reopen and nullify commitments to our Allies following World War II.²

The governments of the United Kingdom, France, Canada, The Netherlands and Norway have pointed out to our State Department that the reversal of Western Allied reparation policy implicit in United States proposals to return vested property to German nationals would violate formal obligations of the United States relied upon by those governments in their postwar dealings with both the United States and the Federal Republic of Germany.³ There is little indication of the careful consideration or even

¹ Jessup, "Enemy Property," 49 A.J.I.L. 58 (1955).

² S. Rep. No. 2809, 84th Cong., 2d Sess. (July 26, 1956). Chancellor Adenauer opened negotiations for release of German assets vested during World War II with a letter to President Eisenhower, dated July 17, 1954, stating: "The Federal Government follows with special interest efforts of the United States Congress to find a solution to the question of seized German assets in the United States. Despite the favorable development of relations between our two countries, this problem has remained unsolved. A solution to it is a special wish of my Government." 31 Dept. of State Bulletin 269 (1954). A strong direct appeal for return was recently made to Congress by Hermann J. Abs, German banker and industrialist, in a letter dated Dec. 28, 1955, to Senator Olin D. Johnston, Chairman, Senate Subcommittee on Trading with the Enemy. Hearings before a Subcommittee of the Senate Committee on the Judiciary on S.854, S.995, S.1405, S.2227, S.3507 (to Amend the Trading with the Enemy Act) and S.3114 and S.3115 (to transfer the office of Alien Property Custodian from the Department of Justice to the Department of State), 84th Cong., 1st and 2nd Sess. (Nov. 29, 30, 1955, and April 20, 1956), p. 320 (hereinafter cited as Hearings on S.854, S.995, S.1405, S.3507, etc.). On his recent visit to the United States Chancellor Adenauer raised the question of vested German assets with Secretary of State Dulles. Joint Communiqué of Chancellor Adenauer and Secretary of State Dulles, 34 Dept. of State Bulletin 1048 (1956). The German Chancellor also conferred with Senator Olin D. Johnston on ways to speed proposed return legislation. New York Times, June 15, 1956, p. 7, col. 6. See Hale and Clift, "Enemy Assets—The \$500,000,000 Question," The Reporter Magazine, July 14, 1956, p. 8.

³ Huijsmans, "German External Assets and American Contractual Obligations," 27 Nederlands Juristenblad 581 (July 14, 1956).

the receipt of the views of these governments by the committees considering return legislation.⁴

In the course of the past ten years, a rational and comprehensive pattern has been established, unique in our history, of joint action with our Allies in the West in dealing with enemy property as an integral part of the reparation problem. On all levels of international collaboration, from formal agreement to administrative practice, a practical mechanism has been established and developed for the essential purpose of preventing incessant reparation demands from hindering Germany's economic recovery and engendering continuous political frictions. Examination of the present status of international agreements relating to vested enemy property shows that full consideration should be given by Congress to this multilateral aspect of post-war reparation agreements with Germany.

In view of the large amounts of grants and loans to Western Germany, the urge is strong to regard compensation from the United States Treasury to German nationals as a bookkeeping transaction, deductible from amounts otherwise granted or lent to Germany.⁵ Solely from our point of view, the attitude is inviting. As chief creditor nation and source of foreign aid we are indeed in the fortunate position of allocating largesse by earmarking items in balance sheets.

Reparation may have little economic significance to the United States, but it has vast importance to Allied countries determined to maintain their integrity and freedom from financial dependence on us.

THE PARIS AGREEMENT ON REPARATION

The keystone of Inter-Allied co-operation in dealing with the problem of reparation from Germany is the Paris Agreement on Reparation of 1946.⁶ This Agreement was the result of a Reparation Conference held in Paris from November 9 to December 21, 1945, a meeting of eighteen Allies convened by the United States, the United Kingdom and France to reach "reasonable and durable solutions" to common problems by concerted action.⁷

⁴ During recent hearings of the Senate Subcommittee on Trading with the Enemy, Senator Olin D. Johnston, Subcommittee Chairman, invited Mr. Hermann J. Abs, chief German negotiator at the 1955 United States-German Conference on return of German assets, to state the German position on proposed United States return legislation. Hearings on S.854, S.995, S.1405, S.3507, etc., *op. cit.* note 2, at 319. None of the Allied Governments was invited to submit its views. In 1953 Senators Kefauver and Hendrickson declared that the Senate Subcommittee reviewing the administration of the Trading with the Enemy Act had given inadequate consideration to the international obligations of the United States with respect to German vested assets. Supplemental Views of Senator Kefauver and Senator Hendrickson, Senate Report of the Subcommittee to Examine and Review the Administration of the Trading with the Enemy Act of the Committee on the Judiciary, 83d Cong., 2nd Sess. (1953), pp. 74, 76.

⁵ Jessup, *loc. cit.* (note 1) at 60.

⁶ The Paris Agreement on Reparation of January 14, 1946 (U. S. Dept. of State Pub. No. 2584, European Series 12), p. 11; 14 Dept. of State Bulletin 114 (1946); 40 A.J.I.L. Supp. 117 (1946).

⁷ Declared Mr. Angell, head of the U. S. Delegation, at the Paris Conference on Reparation, in plenary session: "I am deeply convinced—and I think the history of the past

The essential fact dominating the conference was Germany's obvious inability to compensate Allied countries for war damage claims amounting to nearly 300 billion dollars, "an amount tremendously in excess of the total value of any probable German reparation assets."⁸ The conference proceedings show consensus in support of a new rule of international law—a rule governing war bankruptcy. The parties to the conference regarded themselves as "trustees of a bankrupt."⁹ The conference delegated to the United States, the United Kingdom and France the task of preparing the allocation of reparation shares and the means for distribution of these shares. The draft prepared by the three inviting Powers was accepted by the entire conference with only minor changes.¹⁰

In keeping with Allied policy of avoiding an impractical reparation program, especially "the World War I conception of reparation as the maximum obtainable financial compensation in fixed sums of money,"¹¹ the Paris Act centered on assets which could readily be made available in a short time. These consisted of German external assets located in the participating countries or in neutral territory, industrial equipment and merchant shipping—all "private property" to the extent permitted by German controls. The essential principles of the Paris Agreement involved marshaling of available physical and intangible assets for distribution in specified proportions to joint creditors, coupled with mutually self-imposed limitations on immediate reparation claims.¹² An important aspect of the plan was the mar-

twenty-five years will bear me out—that it is only by a joint effort of this kind that it will be possible to achieve reasonable and durable solutions." Declaration of James W. Angell, Proceedings of the Paris Conference on Reparation of 1945, CPR/P.V.2, Annex I (Nov. 12, 1945).

⁸ Howard, "The Paris Agreement on Reparation from Germany," 14 Dept. of State Bulletin 1023 (1946).

⁹ Proceedings of the Paris Conference on Reparation of 1945, Doc. CPR/P.V.5, Annex 4A.

¹⁰ Rueff, "Les Nouvelles Réparations Allemandes, 1946," in *Nouveaux Aspects du Problème Allemand* (Centre d'Etudes de Politique Etrangère, Pub. No. 17 (1947)).

¹¹ Howard, *loc. cit.* (note 8) at 1023.

¹² Each signatory government's reparation share was limited to the share allocated to it by the Paris Agreement without, however, prejudicing its right to an eventual final settlement of reparation:

"A. The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature, arising out of the war (which are not otherwise provided for), including costs of German occupation, credits acquired during occupation on clearing accounts and claims against the Reichskreditkassen.

"B. The provisions of paragraph A above are without prejudice to:

- (i) The determination at the proper time of the forms, duration or total amount of reparation to be made by Germany;
- (ii) The right which each Signatory Government may have with respect to the final settlement of German reparation; and
- (iii) Any political, territorial or other demands which any Signatory Government may put forward with respect to the peace settlement with Germany." (Art. 2A and B, Paris Agreement on Reparation, *loc. cit.* (note 6).)

shaling of assets in neutral countries, through negotiations conducted by the Three Powers (the United States, the United Kingdom and France), for distribution through the Inter-Allied Reparation Agency.¹³

The plan embodied in the Paris Agreement contains as an integral feature the obligation of all participating countries not to return to German ownership or control enemy assets within their jurisdictions.¹⁴ Following the principle of marshaling of assets for the benefit of all creditors, this obligation is the cornerstone of the entire structure of collection and distribution of available assets. Industrial equipment and merchant shipping as physical, movable property could be the subject-matter of immediate effective delivery. External assets by their very nature required a longer period for liquidation. Well aware of the return of 80% of German enemy property following World War I, the American draftsmen of the Paris Agreement inserted the express inter-Allied obligation barring return—not as an indication of a vengeful confiscatory retaliation, but as a practical assurance that all participating countries would retain available assets for joint reparation account.¹⁵

IMPLEMENTATION OF THE PARIS AGREEMENT

The participating countries have incorporated into their internal legislation the obligation of the Paris Agreement not to return enemy assets. The United States Congress in the War Claims Act of 1948 added Section 39 to the Trading with the Enemy Act to bar return of vested assets “under the provisions of the Paris Conference.”¹⁶

¹³ The Agreement on Reparation directed the United States, the United Kingdom and France, as Trustee Powers, to negotiate the transfer of German assets in neutral countries to the Inter-Allied reparation pool:

“German assets in those countries which remained neutral in the war against Germany shall be removed from German ownership or control and liquidated or disposed of in accordance with the authority of France, the United Kingdom and the United States of America, pursuant to arrangements to be negotiated with the neutrals by these countries. The net proceeds of liquidation or disposition shall be made available to the Inter-Allied Reparation Agency for distribution on reparation account.” (Art. 6C, Paris Agreement on Reparation, *loc. cit.* (note 6).)

Pursuant to this authority the Trustee Powers entered into agreements with Switzerland and Sweden in 1946, Spain in 1948, and negotiated, but never finalized, a draft agreement with Portugal. Inter-Allied Reparation Agency, Report of the Assembly of the Inter-Allied Reparation Agency to its Member Governments, pp. 8–10, Annexes 7, 8, 9, Brussels (1951).

¹⁴ “Each Signatory Government shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets (net of accrued taxes, liens, expenses of administration, other *in rem* charges against specific items and legitimate contract claims against the German former owners of such assets).” (Art. 6A, Paris Agreement on Reparation, *loc. cit.* (note 6).)

¹⁵ Angell, *loc. cit.* (note 7); see also Howard, *loc. cit.* (note 8) at 1027.

¹⁶ During the Senate Subcommittee hearings on the War Claims Act, Senator Cooper, Subcommittee Chairman, asked Mr. Benedict English, Assistant Legal Adviser for International Claims, Department of State:

“I want you to put into the record, if you will, the authority under which our Government can hold these assets and prevent their return to nationals of enemy countries. Is

The Allied High Commission Law No. 63 of August 30, 1951, was enacted to give "binding effect in Germany and on German citizens to transfers effected by other countries under their own laws with respect to German property within their jurisdiction."¹⁷ In the Bonn Convention, entered into in 1952 by the freely elected Government of the German Federal Republic, not only did the Federal Republic agree not to "repeal or amend Law No. 63 except with the consent of the three Powers," but it also agreed to compensate former owners of property applied to reparation account under the Paris Agreement.¹⁸

On the level of international administration of the directives of the Paris Agreement for liquidation and distribution of German external assets to reparation creditors, Congressional enactments evidence a continuing ratification of the principles of the Paris Agreement. In authorizing the President to conclude agreements with respect to inter-Allied custodial conflicts of law as to situs of property, specifically the Brussels Agreement of 1947, the statute provides:

Such agreements shall be in accordance with the policy of the elimination of enemy interest in such property and the efficient administration and liquidation of enemy property in the United States.¹⁹

Every signatory of the Paris Agreement on Reparation and of the Brussels Agreement has in good faith relied on the irrevocability of the general

it under the provisions of the Paris Conference? I wish you would put that into the record."

Mr. English: "Yes. Article 6A of the final act of the Paris Conference on Reparations to [*sic*] Germany, to which the United States and 17 other governments are signatory, provides as follows:

'Each Signatory Government shall. . . .'

[Quotation of Article 6A]"

Senator Cooper: "In other words, this is just considered to be a part of reparations claims against the German and Japanese Governments. . . ." (Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 4044, 80th Cong., 2nd Sess. (1948), p. 22.)

During debate of the measure on the floor of the House, Representative Wadsworth, reporting on H.R. 4044, explained that sec. 39 amending the Trading with the Enemy Act was drafted in keeping with the Inter-Allied Paris Agreement on Reparation. 93 Cong. Rec. 551 (1948). Having recited Art. 6A, he repeated it in part: "May I call the attention of the gentlemen to that language 'to preclude their return to German ownership or control and shall charge against its reparation such assets'." *Ibid.*

¹⁷ Allied High Commission for Germany, Official Gazette, No. 64 (1951), p. 1107.

¹⁸ "The Federal Republic shall ensure that the former owners of property seized pursuant to the measures referred to in Articles 2 and 3 of this Chapter shall be compensated." Ch. Six (Reparation), Art. 5, Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn on May 26, 1952 (hereinafter cited as Bonn Convention), as amended by the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed in Paris on Oct. 23, 1954 (hereinafter cited as Paris Protocol of 1954); Sen. Doc. No. 11, 84th Cong., 1st Sess. (Feb. 18, 1955), p. 103; 49 A.J.I.L. Supp. 98 (1955). The Bonn Convention did not at first become fully effective because of the failure of the French Government to ratify the European Defense Community Arrangement, but it was later expressly incorporated into the Paris Protocol of 1954 and is now in full force and effect.

¹⁹ 50 U.S.C.A. App. § 40 (1956).

agreement to apply German external assets for reparation account in support of its postwar reparation policy and in appropriating funds for operation of the international machinery created chiefly by the United States as a practical means of preliminary settlement of war damage claims.

A signatory government can, and the United States has, renounced part of its share in German reparation under the Paris Agreement. The part renounced has been added proportionately to the percentage entitlement of other member governments.²⁰ Violation of the provisions of the Paris Agreement barring return would thus subject the United States to international liability for breach of the contractual obligation to pay over to the reparation pool the proceeds of liquidation of German enemy property. Member governments have relied on United States agreement to make such assets available for joint reparation account as a condition to their acceptance of limitation of claims.²¹

In substance, of the four original sources of reparation contemplated by the Paris Agreement, only external assets in participating countries and merchant shipping became available for reparation account.

For various reasons, certain forms of reparation, which were counted on at the time of the Paris Conference, had never been demanded of Germany. Further, the value of the deliveries effected turned out to be greatly inferior to that originally envisaged.²²

Only a small fraction of the assets in neutral countries have in fact been transferred to inter-Allied reparation account.²³ Obviously, if the United States as Trustee Power is considering unilateral violation of the Paris Agreement, the neutral countries cannot be expected to perform further under accords already negotiated with them by the United States.²⁴

The partial failure of the reparation program stresses all the more the importance of making available external assets within participating countries for reparation account. If the essential condition of application of these assets for joint account is unilaterally abandoned by the party chiefly

²⁰ The Agreement on Reparation provides:

"If any Signatory Government renounces its shares or part of its shares in German reparation as set out in the above Table of Shares, or if it withdraws from the Inter-Allied Reparation Agency at a time when all or part of its shares in German reparation remain unsatisfied, the shares or part thereof thus renounced or remaining shall be redistributed rateably among the other Signatory Governments." (Art. III, Paris Agreement on Reparation, *loc. cit.* (note 6).)

The Inter-Allied Reparation Agency has reported that on two separate occasions the United States renounced part of its reparation share, which each time became available for rateable distribution to other signatory governments. Inter-Allied Reparation Agency, *op. cit.* (note 13) at 27.

²¹ Huijsmans, *loc. cit.* (note 3) at 585-586.

²² Inter-Allied Reparation Agency, Letter from Jacques Rueff, President of the Agency, to Member Governments, *op. cit.* (note 13).

²³ Inter-Allied Reparation Agency, *op. cit.* (note 13) at 8-10.

²⁴ The agreements of the Trustee Powers with the neutral countries provided for the liquidation of German assets in the latter's territory and the transfer of a part of the proceeds to Inter-Allied Reparation account. Inter-Allied Reparation Agency, *op. cit.* (note 13), Annexes 7, 8, 9.

responsible for the reparation program, the right to reparation in the form of current German production or money payments may well be claimed by other signatories. German interest as well as inter-Allied unity point to the need for maintaining the stand-still policy underlying postwar measures for liquidation and disposal of German external assets in lieu of compelling Allied governments to reopen reparation claims.

THE DURATION OF THE STAND-STILL POLICY

Though the Paris Agreement on Reparation, as a creditors' agreement for marshaling and distribution of a debtor's assets, contains no time limitation, its minimum duration is that necessary to accomplish its purpose; in the case of external assets, application of the proceeds of those assets by all participating countries to reparation account.²⁵ The multilateral agreement not to return external assets to German ownership or control becomes unnecessary only after final settlement of German reparation. The Bonn Convention between the Federal Republic of Germany and the Three Powers stresses the multilateral nature of the reparation problem "to be settled by the peace treaty between Germany and its former enemies or by earlier Agreements concerning this matter."²⁶

The insistence on the multilateral aspect of the obligation not to return as an essential condition of reparation policy is not merely an expression of a wish for inter-Allied unity. It is the shield created by the Three Powers under the leadership of the United States to allay the doubts of the smaller Allied nations which might have preferred to make more advantageous settlements with Western Germany during a period when its bargaining power had not been fully restored. The shield provided in effect a guarantee by each signatory to all that no direct pressure on any single signatory would be permitted to vary the concerted action taken. Aside from the United States, the United Kingdom and France, the participating countries were granted no voice with respect to the extent of assets available for reparation. Their dependence is complete on the maintenance of a common stand against return of German external assets until final multilateral settlement with Germany.

THE BASIS FOR GERMAN DEMANDS

Against the weight of established inter-Allied agreement, policy and practice which has assisted the German Federal Republic in developing its internal economy and foreign trade free of the burden and uncertainty of further reparation demands, German claims for return of vested assets in the United States are supported by the ambiguous contention that the Paris Agreement on Reparation "as an executive agreement, was without author-

²⁵ Inter-Allied Reparation Agency, Proceedings of Meeting of Representatives of the Custodian Officers of Eighteen Governments, Members of the Inter-Allied Reparation Agency (March 14-17, 1949), p. 6.

²⁶ Bonn Convention, as Amended by the Paris Protocol of 1954, Ch. 6, Art. 1, par. 1, *op. cit.* (note 18).

ity whatever to bind the Congress of the United States.”²⁷ The argument has also been repeatedly made that retention of vested assets or their proceeds by the United States and other signatories to the Paris Agreement constitutes confiscation of private property.²⁸

THE PARIS AGREEMENT AS AN “EXECUTIVE AGREEMENT”

The short answer to the inferential statement of Secretary Dulles that the 1946 Paris Agreement on Reparation was entered into without Congressional approval is that in 1948 the Republican-controlled Congress, in enacting the War Claims Act of July 3, 1948, expressly approved and implemented the 1946 Paris Agreement joint obligation not to return vested German property.²⁹ The legislative history of the 1948 statute shows that it was enacted with specific reference to Article 6A of the Paris Agreement on Reparation.³⁰ To the extent that Congressional approval was needed,³¹ the record is clear that Article 6A of the Paris Agreement on Reparation embodying the policy of no return was fully approved and ratified by Congress.³² Congress is of course not “bound” by the Paris Agreement on

²⁷ Testimony of John Foster Dulles, Secretary of State. Hearings before Senate Subcommittee on the Judiciary on S.3423 (the Dirksen Bill), 83rd Cong., 2nd Sess. (1954), p. 161.

²⁸ Letter of Hermann J. Abs of Dec. 28, 1955, Hearings on S.854, S.995, S.1405, S.3507, etc., *op. cit.* (note 2) at 322. Roos, *Zur Konfiskation Privater Deutscher Auslandsvermögen* (Stuttgart, 1956); statement of Walter Germann, Managing Director of Interhandel, Hearings on S.854, S.995, S.1405, S.3507, etc., *op. cit.* (note 2) at 201-202; statement of Senator William Langer, *ibid.* at 524; speech of Senator Olin D. Johnston, 102 Cong. Record 6115 (April 24, 1956); Reeves, “Is Confiscation of Enemy Assets in the National Interest of the United States?” 40 Virginia Law Review 1029 (1954).

²⁹ The War Claims Act of July 3, 1948, 50 U.S.C.A., App. § 39 (1948), 62 Stat. 1240.

³⁰ Note 16 *supra*.

³¹ 5 Hackworth, Digest of International Law 402 (1943). See *U. S. v. Curtiss-Wright Export Corporation*, 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936); *U. S. v. Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134 (1937); *U. S. v. Pink*, 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942).

³² War Claims Act of 1948, *loc. cit.* (note 29). Congress, authorizing the President to conclude inter-custodial conflicts agreements with other nations, declared:

“Such agreements shall be in accordance with the policy of protecting and making available for utilization the American and nonenemy interests in such property and further the elimination of enemy interests in such property and the efficient administration and liquidation of enemy property in the United States.” (50 U.S.C.A. App. § 40, sub. (2) (1950).)

The Joint Congressional Resolution to terminate the state of war between the United States and the Government of Germany stated:

“Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act. . . .” (50 U.S.C.A. App. 1, p. XX (1951); 46 A.J.I.L. Supp. 13 (1952).)

The Treaty of Peace with Italy, in force Sept. 15, 1947, expressly reserved to the Allied and Associated Powers the right to retain and liquidate Italian external assets, the

Reparation any more than it would be "bound" by the most formal of treaties, in the sense of Constitutional limitation on its power.³³ Congress can Constitutionally enact legislation in violation of an international obligation, but its action in so doing lessens in no degree the contractual obligation of the United States with respect to the other party or parties to the agreement.³⁴ Though Congress is free Constitutionally to disregard the provisions of the Paris Agreement on Reparation, the United States internationally is bound to the other parties to that agreement to maintain its provisions in accordance with the contractual obligation assumed, approved and implemented over a period of ten years.

THE CONTENTION OF CONFISCATION

The argument of confiscation of private property must be considered in the full light of the circumstances of war bankruptcy and prewar status of German property. German legislation in effect prior to and during World War II had nationalized the external assets of its citizens. As stated by the House Committee in 1947,

no essential difference exists between private property and public property in the case of Germany and Japan. . . .³⁵

Government of Italy undertaking to compensate former owners. Treaty of Peace with Italy, Art. 79, pars. 1 and 3, 61 Stat. 1247 at 1406-1407 (1948). The same provisions are contained in Art. 27, Art. 25 and Art. 29 of the Rumanian, Bulgarian and Hungarian Peace Treaties, respectively, also in force Sept. 15, 1947. 61 Stat. 1757, 1915, 2065 (1948); see also 42 A.J.I.L. Supp. 47, 179, 225, 252 (1948).

Pursuant to the authority of the Peace Treaties with Rumania, Bulgaria and Hungary, Congress, on Aug. 9, 1955, ordered the vesting and liquidation of blocked assets of these countries in the amount of \$27,000,000, the proceeds to be applied to American claims. International Claims Settlement Act, as Amended, 22 U.S.C.A. 1631 (a) (1955); U.S.C., Congressional and Administrative News, Legislative History (1955), p. 625.

The Treaty of Peace with Japan, in force April 28, 1952, expressed the right of Allied Powers to retain and liquidate vested Japanese assets. Treaty of Peace with Japan, Art. 14, 2(I). U. S. Treaties and Other International Agreements 3169 (1952); T.I.A.S., No. 2490; 46 A.J.I.L. Supp. 77 (1952).

Congress approved and ratified Allied policy on reparation in ratifying the Bonn Convention, as amended by the Paris Protocol of 1954, which records Germany's consent to Allied measures with regard to German external assets and its promise to compensate former German owners. The Bonn Convention of 1952 as Amended by the Paris Protocol of 1954, Ch. Six, Arts. 3 and 5, *op. cit.* (note 18).

³³ A subsequent Act of Congress can supersede a treaty in its operation as internal law. Hackworth, *op. cit.* (note 31) at § 489. The Cherokee Tobacco, 11 Wallace 616 (1871); The Head Money Cases, 112 U. S. 580 (1884); Whitney v. Robertson, 124 U. S. 190 (1888); Chae Chan Ping v. U. S., 130 U. S. 581 (1889).

³⁴ Hackworth, *op. cit.* (note 31) at 185-186.

³⁵ "No essential difference exists between private property and public property in the case of Germany and Japan. For several years before World War II, while Germany and Japan were preparing to make war upon the United States, property owned in the United States by the citizens of both these countries was subject to rigid control of their respective Governments. While the fiction of private ownership was retained, actually property of German and Japanese nationals in the United States was widely used to accomplish the national objectives of those countries." House Report No. 976 (on the War Claims Act), 80th Cong., 1st Sess. (July, 1947), p. 2.

The limited right of German "owners" of external assets to compensation in German internal currency established by German law since 1931 is confirmed in the Bonn Convention of 1954, pursuant to which

The Federal Republic shall insure that the former owners of property seized . . . shall be compensated.³⁶

The issue is not the return of private property seized by the United States or other Allies, but that of compensation for external assets under the control of the German Government since 1931. Indeed, any return or compensation in dollars paid today to German residents would be subject to German Government currency control.³⁷

Whether or not the Federal Republic makes prompt, adequate and effective compensation to the former "owners" is an internal German problem, as it has been since German control of external assets was instituted. Indeed, it is apparent that legislation implementing the Federal Republic's agreement to compensate its nationals is being delayed by the possibility of return legislation in the United States.³⁸ As a matter of practical administration, the Federal Republic is in the best position to investigate and alleviate the hardships and inequities inevitable in large-scale attempts to settle conflicting demands imposed by war.

The issue of the international lawfulness of seizure and retention of alien property centers on the justification for the action. Concededly the unjustified taking of alien property without adequate compensation is confiscation, and as such, not only wrongful under international law but also under American law.³⁹ But, as stated by an American authority on international law,

utilization of enemy private property is not confiscatory when it serves to release the enemy from the payment of claims against it.⁴⁰

Our Constitution imposes no bar to the taking of enemy private property without compensation.⁴¹ Acting on this assumption as recently as 1955, Congress amended the International Claims Settlement Act to provide for the liquidation of blocked and vested Rumanian, Hungarian and Bulgarian assets for the purpose of paying United States claims against those governments and their nationals.⁴²

³⁶ The Bonn Convention of 1952 as Amended by the Paris Protocol of 1954, Ch. Six, Art. 5, *op. cit.* (note 18).

³⁷ German "residents may not dispose of prewar German assets abroad" and new investments are subject to government license. International Monetary Fund, Fifth Annual Report on Exchange Restrictions 157 (1954).

³⁸ Huijsmans, *loc. cit.* (note 3) at 595, note 1.

³⁹ *Russian Volunteer Fleet v. U. S.*, 282 U. S. 481 (1931); *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480, 68 S. Ct. 174, 92 L. Ed. 88 (1947); *Silesian-American Corporation v. Clark*, 332 U. S. 469, 68 S. Ct. 179, 92 L. Ed. 81 (1947).

⁴⁰ Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 1737 (2nd rev. ed., 1945).

⁴¹ *Brown v. U. S.*, 8 Cranch 110 (1814); *Miller v. U. S.*, 11 Wallace 268 (1871); *U. S. v. Chemical Foundation*, 272 U. S. 1 (1926); *Woodson v. Deutsche Gold*, 292 U. S. 749 (1934); *Cummings v. Deutsche Bank*, 300 U. S. 115 (1937); *Clark v. Uebersee Finanz-Korporation*, *loc. cit.* (note 39); *Silesian-American Corporation v. Clark*, *loc. cit.* (note 39).

⁴² International Claims Settlement Act, as Amended, 22 U.S.C.A. 1631.

CONCLUSION

In the absence of the international rules described above, which were established among the Western Allies following World War II, return of German assets to the former "owners" would be a "matter of grace," a matter solely of internal policy. But every post-World War II agreement with war allies or with former enemies confirms the link between retention of German external assets and compensation for war damage claims.⁴³

On the level of internal policy, the argument has been made that retention of enemy property weakens protection of American investments abroad. Yet in a world in which the possibility of war is a continuing threat, the search for means of averting recourse to war is not furthered by making holders of enemy assets trustees for the duration of the conflict. The risk of loss of external assets cannot be disregarded as a factor in deterring aggression.⁴⁴

American investments abroad are protected more effectively through mutual respect for international agreements and the confidence inspired by firm adherence to established undertakings. Possible breach by the United States of formal commitments to its Allies can weaken treaty-based protection of our property interests abroad in greater measure than any gesture of unilateral return of enemy property as a matter of grace.⁴⁵

• ⁴³ Note 32 *supra*.

⁴⁴ American Bar Association, Proceedings of Section of International and Comparative Law 74 (December, 1945).

⁴⁵ The United States has traditionally relied on bilateral treaties for the protection of its foreign investments and property. Declared Herbert Hoover, Jr., Under Secretary of State, in an address to the Harvard Business School Association on June 16, 1956: "The commercial and tax treaty programs have long been an integral part of the effort of our Government to develop on a reciprocal basis standards of fair treatment. Since World War II, 15 commercial treaties, with modernized provisions relating to investments, have been negotiated. Similar treaty proposals are under negotiation or consideration with more than half a dozen other governments." 34 Dept. of State Bulletin 1049 at 1052 (1956). Of the 15 treaties negotiated since World War II, three are awaiting final action by the foreign governments, four are awaiting Senate approval, and the following eight are already in force: with China, 63 Stat. 1299, T.I.A.S., No. 1871; Ethiopia, 4 U. S. Treaties and Other International Agreements 2134, T.I.A.S., No. 2864; Germany, S. Exec. E, 84th Cong., 1st Sess., effective June 14, 1956; Greece, 5 U.S.T. 1829, T.I.A.S., No. 3057; Ireland, 1 U.S.T. 785, T.I.A.S., No. 2155; Israel, 5 U.S.T. 550, T.I.A.S., No. 2948; Italy, 63 Stat. 1255, T.I.A.S., No. 1965; and Japan, 4 U.S.T. 2063, T.I.A.S., No. 2863. Declared Herman J. Phleger, Legal Adviser, Department of State, in a recent address before the New York State Bar Association on June 23, 1956: "Among the rights secured to Americans by these treaties, in consideration of like rights granted in this country, are the right to do business, protection against expropriation, and protection against discriminating treatment." 35 Dept. of State Bulletin 11 at 16 (1956).

THE EXERCISE OF CRIMINAL JURISDICTION UNDER THE NATO STATUS OF FORCES AGREEMENT*

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I. INTRODUCTION

Concomitant with the stationing of United States armed forces in friendly foreign countries is an increasing concern over, and appreciation of, the legal issues arising from their presence. The most controversial question concerns exercise by the host state of criminal jurisdiction over personnel of the visiting United States force. The House Foreign Affairs Committee after extensive hearings refused to accede to critics' demands that this exercise of criminal jurisdiction by foreign countries be officially denounced, and by a vote of 19-10 tabled the condemnatory resolutions.¹ Congressional concern remains strong, however, and the issue is not dormant.

The bitter criticism of this exercise of criminal jurisdiction has been rendered with little attention to practical considerations or to the precise impact upon the forces. The advisability and justice of this power can be adequately evaluated only in the light of day-to-day operations, and it is the purpose of this study to survey the subject and to note some of the problems presented.

In host countries it has become largely the function of judge advocates and other legal officers serving with the forces to help solve complex problems that arise from the administration of justice. One of the most important contributions in this regard has been the development of arrangements with the authorities of the host country to facilitate the accomplishment of the mission of the armed forces with a minimum of interference.

The worldwide commitment of United States forces in peacetime is unparalleled. The contrast between military forces of the past with those of today is striking not only because of the numbers involved, but also because of their composition and logistical organization. United States forces are served overseas by thousands of civilians, both American and indigenous,

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¹ New York Times, March 9, 1956, p. 16, col. 7; see also 102 Cong. Rec. 8450 (daily edition, May 31, 1956).

who are employed by the United States in both appropriated and non-appropriated fund activities.² In many areas these persons are accompanied by dependents. Because the mission of the forces cannot be accomplished without these accompanying civilian personnel, military commanders can no longer restrict their concern to military forces alone. The well-being of new communities in receiving states, essentially American in composition, is a prime responsibility for the United States military commander.

The jurisdictional status of a visiting military force cannot be determined by the automatic application of a principle of international law. In the first place, the applicable principle of international law is itself disputed;³ and in the second place, the circumstances and conditions under which United States forces are deployed abroad require, in the interests of order and justice, that difficulties be anticipated and headed off by negotiated arrangements.

The multitude of problems concerning the relationship between the United States force and the civil authorities of the receiving state, involving such other questions as customs and duties, foreign exchange regulations, local taxation, motor vehicle laws, and the impact of local law, is today approached through a treaty or an agreement which defines more precisely the status of the visiting force and specifies the respective powers which the receiving and sending states may properly exercise with regard to each other. The United States has entered into several such agreements

² Non-appropriated fund activities include, for example, officers' clubs, post exchanges, and the Armed Forces Motion Picture Service.

³ That the visiting force is, under international law, immune from the criminal jurisdiction of the receiving state is the proposition advanced in King, "Jurisdiction over Friendly Foreign Armed Forces," 36 A.J.I.L. 539 (1942); King, "Further Developments Concerning Jurisdiction over Friendly Foreign Armed Forces," 40 A.J.I.L. 257 (1946); *contra*, Barton, "Foreign Armed Forces; Immunity from Criminal Jurisdiction," 27 British Year Book of Int. Law 186 (1954); Schwartz, "International Law and the NATO Status of Forces Agreement," 53 Col. L. Rev. 1091 (1953); Re, "The NATO Status of Forces Agreement and International Law," 50 N.W.U.L. Rev. 349 (1955). In this connection the difference between the 7th and 8th editions of Lauterpacht's revision of Oppenheim, International Law, is noteworthy. The 7th edition states (sec. 445, p. 759): "Whenever armed forces are on foreign territory . . . they are considered extraterritorial, and remain, therefore, under [sending state] jurisdiction." The 8th edition (sec. 445, p. 847) qualified "considered" by the words "by some to be." Dicta in *Kinsella v. Krueger*, 351 U. S. 470, 479 (1956), support the view of Barton and Schwartz. A petition for rehearing was granted Nov. 5, 1956, 352 U. S. 901, 1 L. Ed. 2d 92, so this authority is now of questionable value.

In *Cozart v. Wilson*, 236 F.2d 732 (D.C. Cir., 1956), the Court of Appeals for the District of Columbia cited the *Krueger* case as authority for holding that Japan had jurisdiction to try several servicemen under the Administrative Agreement. The Supreme Court vacated the judgment on the ground that the case was moot, 352 U. S. 884, 1 L. Ed. 2d 82 (1956). Both these decisions indicate that jurisdictional agreements are sometimes construed as ceding jurisdiction from the host state to the visiting force. These agreements in fact refer to the right to *exercise* jurisdiction rather than to the existence of jurisdiction. Authority to try persons by court-martial must be found in domestic law rather than in international agreements. The inherent good sense in negotiating status of forces agreements is demonstrated in Grabb, "What About These Status of Forces Agreements?," 6 Army 34 (1956).

the most significant of which are the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, hereinafter referred to as the "NATO Status of Forces Agreement,"⁴ and the agreement with Japan containing similar provisions, hereinafter referred to as the Japanese Administrative Agreement.⁵ Basic to these agreements is the premise that the visiting United States force is a guest as well as an ally of the host state.

The NATO Status of Forces Agreement became effective between the United States, Belgium, France and Norway on August 23, 1953. Its provisions relative to the exercise of criminal jurisdiction were construed by French authorities as being applicable in France to offenses previously committed but untried.⁶ Subsequently, the agreement has become effective in Canada, Denmark, Luxembourg, Italy, The Netherlands, the United Kingdom, Portugal, Turkey and Greece. Because large numbers of Americans are stationed in France and because of the early effective date of the agreement in that country, the procedures and problems arising there provide particularly helpful examples for study.

II. THE PRINCIPLE OF CONCURRENT JURISDICTION

A. IN GENERAL

Article VII of the NATO Status of Forces Agreement established a pattern of concurrent criminal jurisdiction. It provides generally that the "primary" right of the receiving state to exercise criminal jurisdiction exists when an act of a member of the visiting force or civilian component violates the law of both the receiving and sending states. To this general provision there are, however, two striking exceptions whereby the "primary" right to exercise jurisdiction rests with the sending state over:

- (a) Offenses arising out of an act or omission done in the performance of official duty; and
- (b) Offenses solely against the property or security of the sending state or against a member of the forces or civilian component or dependent of the sending state.

The pattern of concurrent jurisdiction resulted from a compromise designed to strengthen the system of collective security. The NATO Status of Forces Agreement is an integral part of the NATO scheme and the desires of no single nation were paramount in its conception. In hearings before a Congressional committee Deputy Under Secretary of State Murphy

⁴ Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951. 4 U.S.T. 1792; T.I.A.S., No. 2846; 48 A.J.I.L. Supp. 83 (1954).

⁵ Administrative Agreement under Art. III of the Security Treaty between the United States of America and Japan, Feb. 28, 1952, 3 U.S.T. 3341, T.I.A.S., No. 2492; Protocol to Amend Art. XVII of the Administrative Agreement, Sept. 29, 1953, 4 U.S.T. 1846; T.I.A.S., No. 2848. The status of other United Nations forces in Japan is stated in a virtually identical agreement, Agreement Regarding the Status of United Nations Forces in Japan, Feb. 19, 1954, 5 U.S.T. 1123; T.I.A.S., No. 2995.

⁶ See note on case of Zerfoss in 81 Journal de Droit International 737 (1954).

described it as the best agreement that could then be obtained by the United States and as representing considerable concessions to the United States.⁷ The agreement reflects the unwillingness of nations to permit extensive immunity of large military forces permanently stationed within their boundaries from the impact of local law. The rationale of concurrent jurisdiction arrangements in other parts of the world is additionally supported by the unpopularity of extraterritorial rights and the reaction against anything tainted with colonialism. As a consequence of these political realities a system of concurrent jurisdiction also exists in Japan,⁸ Bermuda and other leased bases,⁹ and the Bahamas.¹⁰ In Saudi Arabia,¹¹ Libya,¹² and the Philippines¹³ a slightly altered pattern provides for the exclusive right of the United States to exercise criminal jurisdiction over its forces for all offenses committed within agreed geographical areas usually comprising the United States military bases, although concurrent jurisdiction prevails off the base. In Germany,¹⁴ Korea,¹⁵ Greenland,¹⁶ Ethiopia,¹⁷ and the Ryukyu Islands, on the other hand, United States forces and accompanying personnel remain generally within the exclusive criminal jurisdiction of the United States. In Germany the arrangement is temporary and awaits the negotiation of an agreement similar to the NATO Status of Forces Agreement as modified in accordance with the special requirements in Germany.¹⁸

⁷ Hearings before the House Committee on Foreign Affairs on H. J. Res. 309, 84th Cong., 1st (and 2d) Sess., Pt. 1 (Pt. 2, 2d Sess.) (1956), p. 160.

⁸ Note 5 *supra*.

⁹ Exchange of Notes Between the United States and the United Kingdom Modifying Arts. IV and VI of the Agreement of March 27, 1941 (Exec. Agr. Ser., No. 235; 55 Stat., Pt. 2, p. 1560), July 19 and Aug. 1, 1950. 1 U.S.T. 585; T.I.A.S., No. 2105; 45 A.J.I.L. Supp. 97 (1951).

¹⁰ Agreement Between the United States and the United Kingdom Concerning "The Bahamas Long Range Proving Ground," July 21, 1950, 1 U.S.T. 545, T.I.A.S., No. 2099; see also Agreement of June 25, 1956, T.I.A.S., No. 3595; also Art. XV, Agreement with the Dominican Republic of Nov. 26, 1951, Concerning the Long Range Proving Ground, 3 U.S.T. 2569; T.I.A.S., No. 2425.

¹¹ Par. 13 (c) (i), Exchange of Notes Between the United States and Saudi Arabia Concerning an Air Base at Dhahran, June 18, 1951. 2 U.S.T. 1466; T.I.A.S., No. 2290.

¹² Arts. VI, XX (1) (b), Agreement Between the United States and the United Kingdom of Libya, Sept. 9, 1954. 5 U.S.T. 2449; T.I.A.S., No. 3107.

¹³ Art. XIII, Agreement Between the United States and the Republic of the Philippines Concerning Military Bases, March 14, 1947. 61 Stat. (4) 4019; T.I.A.S., No. 1775. This agreement is in the process of renegotiation, but negotiations were suspended on Dec. 5, 1956.

¹⁴ Art. VI, Convention on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany, Oct. 23, 1954. T.I.A.S., No. 3425.

¹⁵ Exchange of Notes Concerning Jurisdiction over Offenses by United States Forces in Korea, July 12, 1950. 5 U.S.T. 1408; T.I.A.S., No. 3012.

¹⁶ Art. VIII, Agreement Between the United States and Denmark Concerning the Defense of Greenland, April 27, 1951. 2 U.S.T. 1485; T.I.A.S., No. 2292.

¹⁷ Agreement Between the United States and Ethiopia Concerning the Utilization of Defense Installations in Ethiopia, May 22, 1953. 5 U.S.T. 749; T.I.A.S., No. 2964.

¹⁸ See Art. VIII, par. 1(b), Convention on Relations Between the Three Powers and the Federal Republic of Germany, Oct. 23, 1954. T.I.A.S., No. 3425; 49 A.J.I.L. Supp. 57 (1955).

The principle of concurrent jurisdiction has precedent in recent United States and European practice. An agreement of March 14, 1947, between the United States and the Republic of the Philippines concerning military bases provides for the exercise of criminal jurisdiction by the Philippines over certain off-base offenses by military personnel,¹⁹ and an agreement of December 21, 1949, negotiated between the Brussels Treaty Powers, although never in effect because of the promulgation of the NATO Status of Forces Agreement, stated that the primary right of the receiving state to exercise criminal jurisdiction extended even to offenses committed while in the performance of official duty.²⁰ Preceding the Brussels Treaty several bilateral agreements between France and nations stationing troops in France were negotiated which provided for the primary right of France to exercise jurisdiction over members of the visiting forces.²¹

B. UNITED STATES JURISDICTION OVER PERSONS

Paragraph 1(a) of Article VII of the NATO Status of Forces Agreement states that:

the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State.

Article 2 of the Uniform Code of Military Justice²² enumerates the persons subject to United States military law. In addition to ordinary military personnel are included "persons serving with, employed by, or accompanying the armed forces" without the United States subject to the provisions of treaties, agreements, or accepted rules of international law. This has been construed to confer military jurisdiction over civilian employees of United States nationality of both appropriated²³ and non-appropriated fund activities,²⁴ certain merchant seamen,²⁵ aliens brought within a receiving state as employees,²⁶ technical representatives of contractors serving with the forces,²⁷ Red Cross and United Services Organization personnel of

¹⁹ Art. XIII, par. 2, note 13 *supra*.

²⁰ See 22 Dept. of State Bulletin 449 (1950). Signed between Belgium, France, Luxembourg, The Netherlands and the United Kingdom.

²¹ See Anglo-French Agreement of April 19, 1948, G.B.T.S. 44 [1948]. The Soviet Union recently entered into a status of forces agreement with Poland by which certain off-base offenses by members of Russian forces are subject to Polish criminal jurisdiction. In some respects its provisions are strikingly similar to the NATO Status of Forces Agreement. For text of agreement, see New York Times, Dec. 19, 1956, p. 8, col. 1.

²² 10 U.S.C. 801, *et seq.*

²³ U. S. v. Marker, 1 U.S.C.M.A. 393, 3 C.M.R. 127 (1952).

²⁴ U. S. v. Biagini, 10 C.M.R. 682, 690.

²⁵ U. S. v. Garcia, 5 U.S.C.M.A. 88, 17 C.M.R. 88; *cf.* U. S. v. Guidry, 7 C.M.R. 305; U. S. v. Patterson, 16 C.M.R. 295.

²⁶ The Polish Labor Service; see U. S. v. Weiman, 3 U.S.C.M.A. 216, 11 C.M.R. 216.

²⁷ Perlstein v. U. S., 151 F.2d 167 (3d Cir. 1945); cert. dismissed, 328 U. S. 822 (1946); *In re Di Bartolo*, 50 F. Supp. 929 (S.D.N.Y., 1943).

United States nationality.²⁸ Whether dependents of the above can be tried by court-martial awaits the decision of the Supreme Court.²⁹ The Status of Forces Agreement provides that nationals of the receiving state, although employed by the United States, are not considered subject to military law unless they are actually in the military service.³⁰

Persons possessing dual nationality always present special problems. For the purpose of exercising criminal jurisdiction, persons having Japanese nationality as well as United States nationality who are brought into Japan by the United States are considered United States nationals only.³¹ Under the NATO Status of Forces Agreement, however, a person having the nationality of the receiving state as well as United States nationality and who is not a member of the forces apparently is subject to the jurisdiction of the receiving state.

Paragraph 4 of Article VII should not, however, be construed to deprive the United States of its proper jurisdiction over such dual nationals if exercised outside the territory of the receiving state, because the Status of Forces Agreement was not conceived to affect jurisdiction already vested. The purpose of the Status of Forces Agreement, as of other jurisdictional agreements, was to clarify and define more precisely the proper exercise of jurisdictional powers already vested, and the *travaux préparatoires* nowhere indicate that the agreement was conceived as a source of jurisdictional power.³²

A number of United States employees, although United States citizens, have lived abroad for so long that it may be argued with some force that the Status of Forces Agreement precludes the exercise within the receiving state of United States military jurisdiction over them because they are "ordinarily resident" in the receiving state. In practice, however, these United States citizens, even if hired in the receiving state, are considered subject to United States military law and no serious objection to this view has been interposed.

C. JURISDICTION OF THE RECEIVING STATE AS TO PERSONS

According to the NATO Status of Forces Agreement the criminal jurisdiction of the receiving state may be exercised with respect to offenses committed within its territorial jurisdiction over "members of a force or civilian component and their dependents."³³ Members of a force are

²⁸ See Agreement Between the United States and the Republic of Turkey Relating to the Implementation of the "Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces," June 23, 1954, 5 U.S.T. 1465, T.I.A.S., No. 3020, wherein United Services Organization and Red Cross personnel are specifically included within the purview of United States military law.

²⁹ See *Kinsella v. Krueger*, 351 U. S. 470 (1956), note 3 *supra*; see also *Madsen v. Kinsella*, 343 U. S. 341 (1952); *U. S. v. Smith*, 5 U.S.C.M.A. 314, 17 C.M.R. 314.

³⁰ Art. VII, par. 4, NATO Status of Forces Agreement, note 4 *supra*.

³¹ Par. E, Agreed Official Minutes Regarding Protocol to Amend Article XVII of the Administrative Agreement, note 5 *supra*.

³² See Statement of Deputy Under Secretary of State Murphy, Hearings (note 7 *supra*), p. 162; *cf. dicta in Kinsella v. Krueger*, note 3 *supra*.

³³ Art. VII, par. 1(b), note 4 *supra*.

defined as being those present in the receiving state "in connexion with their official duties."³⁴ This condition was placed in the agreement over United States objections and is in contrast to the provision of the Japanese Administrative Agreement wherein the reason for presence in Japan is not material to the application of the agreement. Accordingly, a soldier on military leave in a NATO country other than his place of duty is not within the purview of the NATO Status of Forces Agreement, and he is subject to the rules of law applicable in the absence of a treaty. This was the intention of the drafters as revealed by the *travaux préparatoires*.³⁵ Nevertheless, some countries as a matter of comity or special agreement consider soldiers on leave and deserters as falling within the purview of the agreement.³⁶

It was also the intention of the drafters to exclude from the NATO Status of Forces Agreement military units whose activities in a receiving state were not connected with the North Atlantic Treaty. Netherlands troops, for example, frequently enter Belgium to carry on maneuvers not connected with the North Atlantic Treaty and such forces were not intended to be included within the agreement.³⁷

Military attachés and military aid and assistance group (MAAG) personnel are excluded in practice from the operation of the NATO Status of Forces Agreement. In the *travaux préparatoires* it is indicated that members of missions and MAAG groups enjoying diplomatic privileges should continue to operate with their established jurisdictional immunities.³⁸ The status of those not enjoying diplomatic immunity was not discussed.³⁹

³⁴ Art. I, par. 1(a), *ibid.*

³⁵ Minutes of the Working Group on the Military Status of the Armed Forces of NATO Countries (1951) (cited hereinafter as Minutes of the Working Group), pars. 4-10, MS-R (51) 13.

³⁶ *E.g.*, The Netherlands, see Hearings, p. 20 (note 63 *infra*). Panama provides an example where jurisdictional arrangements exist in absence of treaty or formal agreement.

³⁷ Minutes of the Working Group (note 35 *supra*), par. 5.

³⁸ *Ibid.*, par. 2, MS-R (51) 19.

³⁹ The status of MAAG personnel in the lower ranks who are entitled to no diplomatic privileges whatsoever presents a curious anomaly. For example, under the Mutual Defense Agreement an enlisted man with a MAAG group stationed in London is subject to British criminal jurisdiction, although, if he were on NATO duty, he would not be subjected to the primary right of Great Britain to exercise jurisdiction for offenses arising from the performance of official duty or for offenses against other members of the forces. This unsatisfactory result has not been ameliorated either by directives or formal treaty. The status of MAAG and mission personnel in NATO countries requires more definitive clarification. Personnel attached to the military aid and assistance group usually operate as part of the United States Embassy in that country. In Greece, Ethiopia, Spain, Thailand, and Yugoslavia, MAAG personnel receive full diplomatic immunity, but in Iran, Iraq, Turkey and Saudi Arabia they are subject to the concurrent jurisdiction of the United States and the local authorities. On the other hand, in Belgium, Chile, Colombia, Cuba, Denmark, Formosa, France, Great Britain, Indochina, Indonesia, Italy, Japan, Luxembourg, The Netherlands, Norway, Pakistan and the Philippines their status corresponds to that of personnel in the diplomatic mission. See Hearings before a Subcommittee of the Committee on Armed Services, U. S. Senate, 84th Cong., 2d Sess., to review for the period Dec. 1, 1954, to Nov. 30, 1955, the operation of Art. VII of the Status of Forces Agreement (1956), pp. 30-31.

D. JURISDICTION OVER THE CIVILIAN COMPONENT

The receiving state may, under Article VII of the NATO Status of Forces Agreement, exercise certain jurisdiction over members of the "civilian component." This group is defined in Article I as civilian personnel accompanying the force who are:

in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located.

In lieu of defining the civilian component as "those subject to the military law of the sending state," this terminology was adopted because in the law of several NATO countries, including France, civilian persons employed by a force are not subject to military law.⁴⁰ The definition in the agreement, however, is not easily applicable by the United States because it does not clearly include all civilians subject to United States military law. Merchant seaman, for example, although not employees of the armed services may, under certain circumstances, be subject to military law.⁴¹ It is doubtful, however, whether merchant seamen are always included within the definition of "civilian component" even under the broader provisions of the regulations implementing the Japanese Agreement, which states that the civilian component includes civilian employees on United States forces-operated vessels and aircraft and excludes persons on contract-operated, chartered and general agency agreement vessels.⁴²

Neither is the NATO definition of the civilian component sufficient to include non-appropriated fund activities employees, technical representatives of contractors and Red Cross and United Services Organization personnel, because these persons are not "in the employ of an armed service." The more comprehensive Japanese Agreement, on the other hand, includes these persons within its protection. Avoidance of the jurisdictional problems that these persons present has been achieved by the practice of most NATO receiving states of considering them within the civilian component. In the bilateral agreement with Turkey implementing the Status of Forces Agreement,⁴³ a specific provision includes within the civilian component:

employees of United States Government Departments, post exchanges, and recreational organizations for military personnel, Red Cross and United Services Organization personnel, and technical representatives of contractors.

If these persons are considered part of the civilian component for the purpose of criminal jurisdiction, logic requires that they be similarly considered for purposes of settling claims arising from their activities. Accord-

⁴⁰ Minutes of the Working Group (note 35 *supra*), par. 10, MS-R (51) 18.

⁴¹ *U. S. v. Robertson*, 5 U.S.C.M.A. 806, 19 C.M.R. 102; *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va., 1943); *In re Berne*, 54 F. Supp. 252 (S. D. Ohio, 1944).

⁴² See *U. S. v. Robertson*, cited above, which is in error insofar as it ignores the provisions of Agreed View No. 31a, Agreed Views of Jurisdiction Sub-Committee, Part II, Exercise of Jurisdiction, FEC Pamphlet 27-1, Criminal Jurisdiction in Japan, January, 1956.

⁴³ T.I.A.S., No. 3020, note 28 *supra*.

ingly, such claims against appropriated and non-appropriated fund activities are processed pursuant to the provisions of Article VIII of the Status of Forces Agreement, but payment is made from a special fund to which these activities contribute.⁴⁴

In Europe the United States employs numerous displaced persons who are formed into labor service units under semi-military discipline. Because many are stateless persons, they are not within the definition of "civilian component" as defined in Article I of the Status of Forces Agreement, although they are subject to United States military law.⁴⁵ The United States prefers to consider such persons as members of the force rather than as civilian employees for the purpose of asserting criminal jurisdiction.

The definition of civilian component in the NATO Status of Forces Agreement is inadequate in view of these considerations. The agreement temporarily regulating the status of the United States forces in Germany is more comprehensive and manageable in that it does not attempt to make a special category for the civilian component, but instead groups within the term "members of the forces":

[o]ther persons who are in the service of such armed Forces or are attached to them, with the exception of persons who are [not] nationals [of a] sending State and have been engaged in the Federal territory; provided that such other persons who are stationed outside the Federal territory or Berlin shall be deemed to be members of the forces⁴⁶ only if they are present in the Federal territory on duty.⁴⁶

E. JURISDICTION OVER DEPENDENTS

Deficiencies encountered in defining the civilian component apply equally to their dependents, who are defined in the NATO Status of Forces Agreement as "the spouse of a member of a force or of a civilian component, or a child of such member depending on him or her for support."⁴⁷ Where the spouse is a national of the receiving state the United States does not in practice attempt to assert jurisdiction.

Some confusion with respect to the jurisdiction of the receiving state over dependents results from their omission in paragraph 3 of Article VII of the Status of Forces Agreement wherein the sending state has the "primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to" offenses solely against the receiving state or against another member of the force, civilian component or dependent. This means that the primary right to exercise jurisdiction over dependents always rests in the receiving state and, accordingly, if the United States wishes to exercise jurisdiction over dependents, a waiver of the right to

⁴⁴ Letter AGAC-C (M) 153 (Dec. 13, 1954), Department of the Army, dated Dec. 17, 1954, subject: "Settlement of Claims Arising from Acts or Omissions of Employees of Non-Appropriated Fund Activities in Foreign Countries."

⁴⁵ Note 26 *supra*.

⁴⁶ Art. 1, par. 7, Convention on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany. T.I.A.S., No. 3425.

⁴⁷ Art. I, par. 1(c), NATO Status of Forces Agreement, note 4 *supra*.

exercise primary jurisdiction must be secured from the receiving state. Nevertheless dependents are for operational purposes usually considered subject to the same jurisdictional provisions as members of the forces.⁴⁸

Under the Japanese Agreement, parents and children over 21 may be dependents "if dependent for over half of their support upon a member of the United States armed forces or civilian component." Again, the broader terms of the German Agreement are more manageable as well as more advantageous to the United States. Members of the forces include, besides spouses and children, "close relatives who are supported by [members of the forces] . . . and for whom such persons are entitled to receive material assistance from the forces."⁴⁹

F. UNITED STATES JURISDICTION OVER OFFENSES

1. *Extent of Military Law*

The sending state, pursuant to Article VII of the Status of Forces Agreement, has the right to exercise exclusive criminal jurisdiction over persons subject to its military law "with respect to offences, including offences related to its security, punishable by the law of the sending State, but not by the law of the receiving State."⁵⁰ The United States continues to exercise its exclusive jurisdiction over purely military offenses such as absence without leave or desertion. The internal discipline of the forces with respect to purely military offenses remains, therefore, unaffected by the Status of Forces Agreement.

The receiving state conversely has exclusive jurisdiction over offenses which violate local law only and not the law of the sending state. Few offenses fall within the exclusive jurisdiction of the receiving state if it can be established that the violation of local law constitutes conduct of such a nature as to bring discredit on the armed forces chargeable under Article 134 of the Uniform Code of Military Justice.⁵¹ The application of Article 134 is particularly significant because, if the act is within the exclusive jurisdiction of the receiving state, no possibility of securing a waiver of jurisdiction under paragraph 3(c) of Article VII of the Status of Forces Agreement exists. If the act is chargeable under Article 134, however, a waiver of jurisdiction can be requested, and the receiving state must, according to the Status of Forces Agreement, give it "sympathetic consideration." Therefore, in view of the United States policy to minimize the ef-

⁴⁸ Par. 4b, AEZ Cir. Nr. 550-50, April 13, 1956, Criminal Jurisdiction of Foreign Tribunals over Army Personnel, Headquarters, USAREUR Communications Zone.

⁴⁹ Art. I(7), note 14 *supra*.

⁵⁰ Art. VII, par. 2(a), NATO Status of Forces Agreement, note 4 *supra*.

⁵¹ Art. 134, U.C.M.J. (note 22 *supra*), provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special court-martial, according to the nature and degree of the offense, and punished at the discretion of that court."

fect of foreign jurisdiction over United States forces,⁵² a broad construction of Article 134 of the Uniform Code has been found desirable.

The practical import of such a construction is illustrated by the fact that one of the criminal offenses of which Americans abroad are most frequently accused is the infliction of personal injuries through simple negligence usually resulting from the operation of a motor vehicle.⁵³ United States military law recognizes that negligent homicide is an offense violative of either the first or second clause of Article 134,⁵⁴ but merely causing personal injuries as a result of simple negligence does not automatically constitute an offense under the Uniform Code of Military Justice.⁵⁵ Nor is every violation of foreign law an offense in violation of Article 134. The criteria for establishing a transgression of Article 134 is that the violation of foreign law must either be a disorder or neglect to the prejudice of good order and discipline or it must bring discredit upon the armed forces.⁵⁶ If causing personal injuries through simple negligence is violative of the criminal law of the receiving state, in view of the strong disfavor that such conduct imports to the armed forces and the grave problem of automobile accidents, it can be argued with persuasiveness that causing personal injuries through the negligent operation of a motor vehicle may constitute a violation of Article 134 of the Uniform Code of Military Justice. A waiver of the primary right to exercise jurisdiction can, accordingly, be sought.

2. *Avoidance of the Exercise of Dual Jurisdiction*

The Status of Forces Agreement denominates the concurrent jurisdiction of the sending state as primary where the offense is:

solely against the property or security of that State, or . . . solely against the person or property of another member of the force or civilian component of that State or . . . dependent; . . .⁵⁷

Under this provision, when a United States soldier robs another United States soldier, he commits an offense within the primary right of the United States to exercise jurisdiction. If the theft is followed by a wrongful disposition of the goods to a receiving-state national, an offense is committed within the jurisdiction of the receiving state. The proper administration of criminal justice requires, however, that in criminal cases wrongful acts arising from the same circumstances be adjudicated at a single trial. Therefore, where the principle aspect of the case involves an offense against a member of the forces, the United States, in order to avoid a foreign trial, must urge the local authorities to accept the United

⁵² S. Rep. 2558, 84th Cong., 2d Sess., on the Operation of Art. VII, NATO Status of Forces Treaty (1956), p. 3. This policy is also inferred from the terms of Art. VIII. Department of Defense Directive 5525.1, Nov. 3, 1955, "Status of Forces Policies and Information"; reproduced in Hearings (note 7 *supra*).

⁵³ This is a criminal offense in Canada, the United Kingdom, Japan, and France, and most other NATO countries.

⁵⁴ U. S. v. Kirchner, 1 U.S.C.M.A. 477, 4 C.M.R. 69.

⁵⁵ U. S. v. Eagleson, 11 C.M.R. 893.

⁵⁶ U. S. v. Wolverton, 10 C.M.R. 641, 643.

⁵⁷ Art. VII, par. 3(a)(i), NATO Status of Forces Agreement, note 4 *supra*.

States' disposition of the entire circumstances. In serious cases little difficulty is encountered. For example, if a soldier kills his American wife, the United States has the primary right to exercise jurisdiction over the homicide, but the receiving state may have jurisdiction over lesser included offenses, such as breach of the peace or illegal possession of firearms. Authorities of the receiving state are usually willing in such a case to waive their primary right to exercise jurisdiction, but for less serious offenses disposition of the affair in one criminal trial is more difficult to achieve.

The necessity of making a complete disposition of an offense in a single trial is demonstrated by a typical example. If a United States soldier who misappropriates an Army vehicle is involved in a hit-and-run accident in which the victim is a national of the receiving state, he has committed two separate offenses against the law of both the sending and receiving states. However, the sending state would have primary jurisdiction over the misappropriation, while the receiving state would have primary jurisdiction over the hit-and-run offense. If no waiver of jurisdiction is secured and two trials are held, the accused may plead for leniency before the receiving-state tribunal on the ground that he is about to be tried by court-martial for theft of a vehicle. The same accused in a trial by court-martial may then plead in mitigation of the sentence that he has already been tried and sentenced by a foreign tribunal for a crime arising out of the same circumstances. Such tactics have met with some success. It has been found that this danger as well as the inconvenience of two trials can best be avoided by obtaining waivers of jurisdiction and trying all aspects of the case at once.

Furthermore, a crime is not within the primary right of the sending state to exercise jurisdiction over it unless it is "solely" against the person or property of a person connected with the sending-state forces. The word "solely" is highly restrictive and therefore if the victims of a single wrongful act include a receiving-state national, the offense is subject to the primary right of the receiving state to exercise jurisdiction and the United States must secure a waiver in order to exercise its jurisdiction.

3. Offenses Arising from the Performance of Official Duty

Offenses by members of the forces, or the civilian component, "arising out of any act or omission done in the performance of official duty" are within the primary right of the sending state to exercise jurisdiction under both the NATO Status of Forces Agreement and the Japanese Agreement. Official duty is determined in Japan pursuant to a provision in the official minutes annexed to the Japanese Agreement which states that:

Where a member of the United States armed forces or a civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall in any judicial proceeding be sufficient evidence of the fact unless the contrary is proved.⁵⁸

⁵⁸ Par. 3(a)(ii), Agreed Official Minutes Regarding Protocol to Amend Article XVII of the Administrative Agreement, Sept. 29, 1953, note 5 *supra*.

It was further agreed in Japan that "any proof to the contrary should be presented to the Joint Committee for consideration."⁵⁹ Thus an officially sanctioned method of determining official duty was provided by agreement.

The working group drafting the Status of Forces Agreement considered that only the authorities of the force could decide whether an act was committed in the performance of official duty.⁶⁰ In view of the *travaux préparatoires*, it appears to be the Department of Defense position that official duty determinations by a commanding officer should be final.⁶¹ Nevertheless, some confusion on this point arose when the Senate Foreign Relations Committee in April, 1953, considered the agreement prior to its submission for the Senate's advice and consent. The Legal Adviser of the Department of State testified that the courts of the receiving state could determine the duty status of the accused.⁶² In contrast to the testimony of the Department of State representative, Major General (then Brigadier General) Hickman, The Judge Advocate General of the Army, testified in March, 1955, before a subcommittee of the Senate Armed Services Committee that, although Turkey had interpreted the treaty as vesting in the Turkish courts final authority to determine official duty status, it was nevertheless the Department of Defense's position that official duty determinations in all countries should properly rest with the authorities of the sending state.⁶³

Great Britain, in enacting the legislation necessary to implement the Status of Forces Agreement, specified that British courts may determine whether the offense occurred during the performance of official duties.⁶⁴ The certificate of the commanding officer under the British statute is considered determinative evidence unless the contrary is shown. The British position was the result of Parliamentary criticism of a proposal that the certificate of official duty status as issued by the sending state be final.⁶⁵

It has been argued in support of the United States position that determinations of duty status by the sending state are similar to statements of status issued by the Department of State which conclusively declare who is entitled to diplomatic status.⁶⁶

⁵⁹ Agreed View No. 43, note 42 *supra*.

⁶⁰ "The Working Group had considered that only the authorities of the force could decide in the case of an offence whether or not it had been committed in the performance of official duty. Since Article VII dealt with criminal offences, it was desirable to ensure that punitive action could be taken as promptly as possible, which would rule out the possibility of intervention by an arbitrator." Par. 8, D. R. (51) 41. Minutes of the Working Group, note 35 *supra*.

⁶¹ Hearings (note 7 *supra*), p. 302.

⁶² Hearings before Committee on Foreign Relations, U. S. Senate, 83d Cong., 1st Sess., on Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters (1953), p. 71.

⁶³ Hearings before a Subcommittee of the Committee on Armed Services, U. S. Senate, 84th Cong., 1st Sess., to Review the Operation of Art. VII of the Status of Forces Agreement (1955), p. 28.

⁶⁴ The Visiting Forces Act of 1952, 15 & 16 Geo. VI, and 1 Eliz. II c. 67; 32 Halsbury's Statutes of England (2d ed.) 985. The Status of Forces Agreement became effective in Great Britain on June 13, 1954.

⁶⁵ See Hearings (note 63 *supra*), p. 30.

⁶⁶ *Ibid.*

That the phrase "performance of official duty" was not intended to embrace a legal concept peculiar to a single nation is revealed by the minutes of the working group drafting the Status of Forces Agreement. Concepts of the scope of official duty differ. In Turkey, for example, it was long the position of Turkish authorities that if a Turk were killed as a result of the negligent operation of an automobile driven by a member of a visiting force, it could not constitute an act committed in the performance of official duty because the official duty did not contemplate the killing of a Turk.^{66a}

Because it is in the United States' interest to apply a broad concept of "official duty" in order to retain the primary right to exercise jurisdiction,⁶⁷ the ultimate benefit of the act in question to the United States is used as the criterion. In conformity with this test a member of the forces, while traveling to and from work or on a permanent change of station in a privately owned vehicle, can properly be considered as performing official duty for jurisdictional purposes. The travel is authorized and its purpose, to arrive at the duty station, is in a large part to serve the Government.⁶⁸ The importance of this concept of official duty is manifest. In a one-year period, among approximately 1,000 cases in which French authorities were notified that the United States had the primary right to exercise jurisdiction because the act occurred during the performance of official duty, over 400 involved travel in a private vehicle, much of which was to and from work. This concept of official duty does not develop further claims problems under Article VIII of the NATO Status of Forces Agreement because United States personnel are required to maintain private insurance upon their own vehicles.⁶⁹ French acquiescence in the interpretation is perhaps encouraged by a similar concept of official duty in French military law.⁷⁰ Official duty as including travel to and from work is disputed in Japan.

III. REPORTING THE EXERCISE OF CRIMINAL JURISDICTION

When the NATO Status of Forces Agreement received the advice and consent of the Senate, considerable concern was expressed with respect to its jurisdictional provisions. The resolution of advice and consent of the Senate included the following statements, *inter alia*:

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2. Where a person subject to the military jurisdiction of the United States is to be tried by the authorities of a receiving state, under the treaty the commanding officer of the Armed forces of the United States in such state shall examine the laws of such state with particular ref-

^{66a} A law of July 16, 1956, brings the Turkish law in this respect into conformity with the practice in other NATO countries. ⁶⁷ Note 52 *supra*.

⁶⁸ Par. 2c, AEZ Cir. Nr. 550-50, April 13, 1956, note 48 *supra*.

⁶⁹ The military commanders, however, must specially require that travel to and from work be included within the insurance coverage because in some countries, such as France, such travel is not covered in the standard insurance contract.

⁷⁰ Tignières, Cass. Crim., June 12, 1947, wherein it was determined that travel between the place of duty and the place of residence was "en service commande" and that French military authorities had the power to make final determination of this question.

erence to the procedural safeguards contained in the Constitution of the United States;

3. If, in the opinion of such commanding officer, under all the circumstances of the case, there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States, the commanding officer shall request the authorities of the receiving state to waive jurisdiction in accordance with the provisions of paragraph 3 (c) of article VII (which requires the receiving state to give "sympathetic consideration" to such request), and if such authorities refuse to waive jurisdiction, the commanding officer shall request the Department of State to press such request through diplomatic channels and notification shall be given by the executive branch to the Armed Services Committees of the Senate and House of Representatives;

.

The armed services have designated, for the purpose of implementing this resolution, "commanding officers" for all countries exercising criminal jurisdiction over United States forces. It is incumbent upon them to insure adherence to the jurisdictional agreements, and to report any possible breaches.

In France it is required that (a) persons protected by the NATO Status of Forces Agreement will report to their immediate commanding officer any incidents or accidents which may give rise to the exercise of French jurisdiction; (b) military commanders in cases where the French may have jurisdiction will report this information, together with all pertinent data, to a higher command, preferably one with a judge advocate.⁷¹ The impact of foreign jurisdiction is then reported in detail to the Judge Advocate General of each service at least twice a year,⁷² and in important cases the higher command and the Judge Advocate General concerned are notified immediately. Similar procedures are in effect in every country which may exercise criminal jurisdiction over United States forces. •

To secure complete coverage and permit the armed services to meet their responsibilities, reports must be made for all incidents in which a person subject to the Uniform Code of Military Justice is involved and where a person not subject to the Uniform Code is injured, killed, or his property has been damaged, lost, or destroyed. Although it may appear initially that the person subject to military jurisdiction is not at fault and no criminal liability is evident, an accurate and timely report of the incident is desirable in view of the fact that liability in receiving states may be based upon concepts and regulations not immediately apparent, and that the injured party has the right in certain Continental countries to bring a direct criminal action without consulting the prosecutor.

The burden of reporting the great bulk of acts or incidents to a higher headquarters in the Army falls on the already paper-burdened company commander. He may be consoled only by the thought that the NATO Status of Forces Agreement was not designed as a wartime measure and that, should hostilities ever break out, neither sending nor receiving states

⁷¹ See pars. 6-7 AEZ Cir. Nr. 550-50, note 48 *supra*.

⁷² Art. XI, Department of Defense Directive 5525.1, Nov. 3, 1955, note 52 *supra*.

should properly expect the agreement to remain effective for very long.⁷³ The concern of the small unit commander with these jurisdictional questions is particularly necessary because of the policy that disciplinary action should never be taken against any person pending the determination of where the primary right to exercise jurisdiction is vested. If military jurisdiction is exercised before the primary right to exercise jurisdiction is obtained, and subsequently the receiving state asserts its jurisdiction, the offender may plead the so-called "double jeopardy" provisions of paragraph 8 of Article VII of the Status of Forces Agreement as a bar to the receiving state's action.⁷⁴

IV. DETERMINATION OF THE PRIMARY RIGHT TO EXERCISE JURISDICTION

In France all reports of incidents received from Army unit commanders are reviewed by judge advocates or other legal personnel.⁷⁵ Besides the obvious advantage of securing uniformity in recommendations, this review by judge advocates or legal officers has the effect of obtaining greater respect on the part of the receiving state for decisions of the United States with respect to its wish to assert the right to exercise primary jurisdiction.

In France when the United States Army commander has determined, with the advice of his judge advocate, that the right to exercise primary jurisdiction over an offense by military personnel has vested in the United States, he is directed to:

inform the appropriate local French procureur of the nature of the incident by letter in French, or by a letter in English accompanied by a French translation. . . . [Which shall include the following statement:] "The United States authorities have not waived their exclusive (or primary) jurisdiction over the incident. Unless a reply hereto is received within 10 days, the United States will proceed with appropriate disposition of this case."⁷⁶

If the *procureur* questions the United States' right to exercise primary jurisdiction, it has been found that a more dispassionate solution can be achieved by resolving the dispute on a national level; *e.g.*, in France between a representative of the French Ministry of Justice and a representative of the United States Army, Europe, which is responsible for NATO

⁷³ Art. XV, par. 2, of the NATO Status of Forces Agreement provides that in the event of hostilities any provision of the agreement can be suspended unilaterally with 60 days' notice.

⁷⁴ Art. VII, par. 8, NATO Status of Forces Agreement provides:

"Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party."

⁷⁵ Par. 8a, AEZ Cir. Nr. 550-50, note 48 *supra*.

⁷⁶ Par. 8a(4d), *ibid*.

Status of Forces problems for all United States armed services in France. In Japan liaison at the national level is accomplished by a joint committee established by Article XXVI of the Administrative Agreement.⁷⁷ The joint committee is precluded from negotiating waivers because the decision of the local prosecutor with respect to waivers is final.

Delay, a perennial problem in legal procedure, is an additional hazard if two authorities having power to exercise jurisdiction cannot decide which shall first act. Where the right to exercise jurisdiction is denominated as primary or secondary between two states, procedures must be devised to inform the other state whether the state holding the right to exercise primary jurisdiction will act. This must be determined with reasonable dispatch. In Japan the problem is partially solved by a subsidiary agreement which specifies that:

When written notification has been made to either United States or Japanese authorities by the authorities of the other State of the commission of an alleged offense by a member of the United States armed forces, the civilian component, or a dependent, over which Japan has the primary right to exercise jurisdiction, Japan shall, through the Ministry of Justice, advise the legal office of the headquarters in Japan of the branch of the armed forces of which the accused is a member, whether it will exercise jurisdiction by bringing an indictment in the case. If the above advice is not received by the legal office concerned within [5 days after the date of the original notification of alleged offense for offenses punishable under Japanese law by confinement for six months or less and for minor offenses, or 20 days after the date of original notification of alleged offense for offenses punishable under Japanese law by confinement for more than six months] . . . or if notice is received that Japan will not bring an indictment, the United States may exercise jurisdiction in any such case. . . . When written notification has been made to either United States or Japanese authorities by the authorities of the other State of the commission of an alleged offense by a member of the United States armed forces or the civilian component, over which the United States has the primary right to exercise jurisdiction . . . [because the offense was committed in line of duty against Japanese nationals] the United States shall, through the commanding officer of the alleged offender, advise the chief procurator of the district in which the alleged offense occurred whether it will exercise jurisdiction. When the chief procurator concerned does not receive the advice mentioned above within 10 days, counting from the day after the date of the original notification of the alleged offense, Japan may exercise jurisdiction in any such case.⁷⁸

That the United States does not waive its right to exercise primary jurisdiction does not require that the accused be tried by court-martial or disciplined under Article 15 of the Uniform Code of Military Justice. The United States is merely required to investigate the case at least informally and to take appropriate action. If no action is taken, it is the United States view that the receiving state may not assert a right to exercise jurisdiction until the United States formally waives its primary right to jurisdiction.⁷⁹

⁷⁷ Note 5 *supra*.

⁷⁸ Agreed View No. 40, note 42 *supra*.

⁷⁹ But see the issue of the Whitley case, *infra*.

V. WAIVERS OF JURISDICTION

A. IN GENERAL

The Status of Forces Agreement and the Japanese Administrative Agreement both contain a provision stating that:

The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.⁸⁰

The significance of this waiver provision is evidenced by the fact that in the one-year period, December 1, 1954, to November 30, 1955, in the North Atlantic Treaty area, a waiver of local jurisdiction was obtained in 2,840 cases, over half the number of offenses subject to foreign jurisdiction.⁸¹ The Department of Defense has reported that the Army secured a waiver of jurisdiction in over 83 percent of the offenses subject to the jurisdiction of NATO countries.⁸² In Japan the percentage of waivers, 95 percent, is significantly higher for this one-year period,⁸³ and the worldwide figures indicate that waivers of jurisdiction were obtained in 66 percent of all cases subject to foreign jurisdiction.⁸⁴ The high percentage of waivers is in a large measure due to informal as well as formal agreements with receiving-state authorities, which provide that the receiving state will normally waive its right to exercise primary jurisdiction. The agreement with The Netherlands supplies an example of a formal provision encouraging waivers. It states:

The Netherlands authorities, recognizing that it is the primary responsibility of the United States authorities to maintain good order and discipline where persons subject to United States military law are concerned, will, upon request of the United States authorities, waive their primary right to exercise jurisdiction under Article VII [NATO SOF] except where they determine that it is of particular importance that jurisdiction be exercised by the Netherlands authorities.⁸⁵

Deputy Under Secretary of State Murphy recently testified to the existence of other agreements which "are classified at the request of the other governments involved largely because of the generosity of these arrangements to our forces."⁸⁶

A further reason for the large percentage of waivers has been the establishment in many areas of a co-operative and friendly relationship between local prosecutors and representatives of the military forces. That the military discipline of the visiting forces remain strong and effective is in the

⁸⁰ Art. VII, par. 3(c), NATO Status of Forces Agreement, note 4 *supra*; par. 3(c), Protocol to Amend Article XVII of the Administrative Agreement, note 5 *supra*.

⁸¹ Hearings (note 7 *supra*), p. 572.

⁸² *Ibid.*, p. 573.

⁸³ *Ibid.*, p. 608.

⁸⁴ *Ibid.*, p. 562.

⁸⁵ Par. 3, Annex to Agreement Between the United States and The Netherlands Concerning Stationing of United States Armed Forces in The Netherlands, Aug. 13, 1954, T.I.A.S., No. 3174. See also Art. II, Agreement between the United States and Greece concerning the Status of United States Forces in Greece, Sept. 17, 1956, T.I.A.S., No. 3649.

⁸⁶ Hearings (note 7 *supra*), p. 167.

interests of the receiving state. This can best be accomplished where the forces are permitted to discipline breaches of the law promptly and with minimum outside interference. The French Minister of Justice has directed local prosecutors in conformity with this reasoning to waive French jurisdiction for ordinary breaches of the peace not involving excessive violence or private rights.⁸⁷

Although the Status of Forces Agreement and the Japanese Agreement indicate that waivers are to be requested only in cases of particular importance, it is the United States policy to attempt to secure a waiver of jurisdiction from the receiving-state authorities in practically all cases.⁸⁸ It is, however, always incumbent upon the United States to specify a reason for the request in order to comply with the terms of the agreements. One reason for a waiver of jurisdiction is that sanctions peculiar to military jurisdiction may be considerably more effective in securing compliance with the law than the sometimes less rigid sanctions of civilian courts. Besides the ordinary penal sanctions available to the military courts, a dishonorable discharge or a dismissal from the service can be adjudged by a court-martial. Non-judicial punishments may be imposed pursuant to Article 15 of the Uniform Code of Military Justice or the accused can be transferred to another country. It has been alleged from time to time that the sentences of foreign courts have not been commensurate with the seriousness of the crime and that consequently the discipline of the forces has suffered,⁸⁹ but the criticism may not be entirely accurate because it has been in reply to complaints that foreign justice is harsh or otherwise unfair.⁹⁰ Several cases, however, do indicate that some offenses, severely punished under military law, are looked upon with more benevolence by a foreign court.⁹¹ Emphasis on this aspect as a reason for the request for a waiver of the right to exercise jurisdiction can lead, not to a grant of more waivers, but to increased sentences in receiving states.

⁸⁷ Sec. V, Circular from French Minister of Justice to the Procureurs Généraux, Subject: "Allied Forces Stationed in France by Virtue of the North Atlantic Treaty," translated by Headquarters, United States Army Europe Communications Zone, August, 1953.

⁸⁸ Note 52 *supra*.

⁸⁹ Hearings on H. R. 3744 and H. R. 7646, Subcommittee of the House Committee on Armed Services, 84th Cong., 2d Sess., p. 6907; see also Hearings (note 7 *supra*), pp. 167, 175.

⁹⁰ Hearings (*ibid.*), p. 175.

⁹¹ Letter from General Gruenther to Representative Udall, dated March 1, 1956, Hearings (note 7 *supra*), p. 946; see also the case of Airman Third Class Jose E. Montijo, Newsweek, Feb. 20, 1956; also list of U. S. personnel subject to U. S. military law confined in foreign penal institutions as of May 31, 1955, Hearings (note 7 *supra*), p. 337. Several years ago a civilian employee of the Army in France killed his wife by what was described as a "physical beating characterized by the utmost savagery." France, pursuant to the agreement then effective, had primary jurisdiction and accordingly the juge d'instruction intended to send the case to a tribunal correctionnel, which could only impose a sentence of up to five years. A United States Senator interceded in the case, however, and as a result of discussion between the United States Embassy and the French Minister of Justice, a waiver of jurisdiction was obtained. The accused was tried by general court-martial, convicted of murder and sentenced to life imprisonment. *U. S. v. Grisham*, 4 U.S.C.M.A. 694, 16 C.M.R. 268.

B. THE EFFECT OF A WAIVER OF JURISDICTION

Whether a waiver of jurisdiction is an irrevocable alienation of the power of the state to punish is not clear from the terms of the Status of Forces Agreement. The subject is of considerable importance if the state to which jurisdiction is waived fails to assert jurisdiction over an accused, or if the state lacking a primary right to exercise jurisdiction asserts jurisdiction without first securing a waiver.

A case now in litigation involving an Air Force officer stationed in France has raised several questions with respect to the effect of a waiver of jurisdiction by the receiving state. In November, 1953, Major Whitley, an Air Force officer stationed in France with a NATO headquarters, suffered a blowout while driving to his home from Paris where he had attended a social function. The car crashed into a tree and a passenger, a Canadian officer, attached to the same NATO headquarters, was killed. The cause of the blowout was never established, although it was later alleged that the tire had been deliberately slashed in Paris as an anti-American gesture. Pursuant to a request of Air Force authorities, the public prosecutor of Corbeil on January 7, 1954, agreed to waive French jurisdiction over the incident. An informal Air Force investigation, not conducted under Article 32 of the Uniform Code of Military Justice, concluded that evidence was insufficient to warrant court-martial charges against Major Whitley for the death of the Canadian officer. Whitley's insurance company refused the demand of the Canadian officer's widow for compensation on the ground that civil liability was not established. The widow, who under Canadian law could receive no pension, since the husband was not killed while on duty, on January 19, 1954, initiated a suit against Major Whitley in a French criminal court, relying upon a provision of the French Code of Criminal Procedure which permits a criminal court to adjudicate the civil claim arising from the criminal act.⁹² Among the issues considered by the French courts was the effect of the prosecutor's "waiver" of jurisdiction. It was argued on behalf of Major Whitley that the waiver by the prosecutor divested criminal jurisdiction from the French courts. The *Tribunal Correctionnel* of Corbeil rejected this argument, and the judgment against Major Whitley was affirmed on appeal to the *Cour d'Appel* of Paris.⁹³ The *Cour d'Appel* interpreted the act of the prosecutor not as a judicial act but as a simple act of discretion made in the interests of policy which was by no means irrevocable and unconditional. On the contrary, the court considered that French judicial competence remained as long as the United States authorities took no judicial action within the meaning of paragraph 8 of Article

⁹² Arts. 145 and 182, Code d'Instruction Criminelle. The origin of this procedure is examined by Esmein, *A History of Continental Criminal Procedure* 143-144 (Boston, 1913). Somewhat similar procedures exist in Belgium, Luxembourg, The Netherlands, Italy and Turkey.

⁹³ Copies of these opinions secured from Colonel Howard S. Levie, Washington, D. C. It is understood that the Whitley case is on appeal to the Cour de Cassation. *Contra*: cases of Zerfoss (see note 6 *supra*); Saccomandi, *Cour d'Appel* de Paris, Nov. 23, 1954; Lantagne, *Cour d'Appel* de Paris, Dec. 13, 1954; Sykes, *Cour d'Appel* de Bourges, July 1, 1954.

VII of the Status of Forces Agreement.⁹⁴ The action of the military authorities in investigating the case and in deciding that no grounds for prosecution existed, was not considered an action sufficiently judicial to preclude the reassertion of jurisdiction.⁹⁵ The lower court had stated that whatever the effect of the prosecutor's action, it could not affect the right of a person to initiate a criminal action pursuant to the provisions of the Code of Criminal Procedure. The *Cour d'Appel* lent support to this more extreme position.

The result in the *Whitley* case can be criticized on several grounds. First, a waiver of the right to exercise jurisdiction is of significance only if it can bring certainty into the administration of justice. Because justice is not served if two jurisdictions are disputing who shall first act, the purpose of a waiver is only served if this dispute is resolved quickly and with finality. Second, the Status of Forces Agreement concerns the exercise of jurisdiction rather than the creation of jurisdiction. It designates the state which is first competent to exercise jurisdiction, leaving to the other state a subsidiary right. Because the purpose of the agreement is to prevent a criminal case from being referred to two states, the agreement must indicate where jurisdiction is to be exercised and prevent the exercise of jurisdiction by the second state. Therefore the waiver is purposeless unless it is an insulation from the waiving state's exercise of criminal jurisdiction.

The French court did not consider the ambiguity between the French and English texts of the waiver clause in the treaty. The English text states: "The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right. . . ." The French text provides: "*Les autorités de l'Etat qui a le droit d'exercer par priorité sa juridiction examinent avec bienveillance les demandes de renonciation à ce droit, présentées par les autorités de l'autre Etat. . .*" The key word in the French text, "*renonciation*," a word having connotations of irrevocability, may properly be rendered "renunciation." The French word for waiver is "*dessaisissement*." However, both the French and English texts are equally authoritative and such ambiguity as exists can only be resolved by agreement.

The purpose of paragraph 3 of Article VII of the NATO Status of Forces Agreement would not be achieved unless the waiver were binding upon the injured party. Diplomatic immunity protects the diplomat against direct proceedings brought by the victim as well as those brought by authorities of the state.

Moreover, the NATO Status of Forces Treaty waiver provisions refer to the right of states to exercise *jurisdiction* rather than the right of states to *investigate*. By the terms of the treaty a waiver is in the nature of an international courtesy extended by one state at the request of the other; it is not a mere decision of an individual not to prosecute a case.⁹⁶ It would be

⁹⁴ Note 74 *supra*.

⁹⁵ See *U. S. v. Werthman*, 5 U.S.C.M.A. 440, 18 C.M.R. 64.

⁹⁶ The *Whitley* case is discussed in 43 *Revue Critique de Droit International Privé* 602 (1954) by Professor Leauté.

impractical and unjust to require the state to which the right to exercise jurisdiction is waived to institute formal proceedings against an accused if no ground for prosecution exists, or if stringent measures not placing an accused in jeopardy are imposed. These views of a waiver presuppose the existence of a high degree of mutual trust and confidence between the authorities of the receiving and sending states. This is natural and proper, inasmuch as the very foundations of NATO are grounded on the belief that such trust and confidence not only exist but are capable of being extended and deepened by the common ties and experiences which NATO provides.

C. THE EFFECT OF CIVIL COMPLAINT UPON A WAIVER OF JURISDICTION

A waiver of the right to exercise jurisdiction is not as easily obtained if a victim has instituted a complaint. Prior to trial in France, a request for a waiver of jurisdiction where a victim has instituted a criminal action must be processed through the French Ministry of Justice in Paris rather than by the local prosecutor, who otherwise could grant the waiver.⁹⁷ Once trial is commenced, only the judge can discontinue the action or grant a waiver.⁹⁸

Experience indicates that prompt and efficient processing of civil claims can reduce the number of criminal prosecutions against United States personnel and increase the numbers of waivers of jurisdiction, or reduce the severity of sentences. This is particularly true in countries such as France, which permit an injured person to institute a criminal action in the same proceedings as the plea for civil damages by means of a *citation directe*. The civil party, however, is less prone to initiate such an action if his own damages are settled. Accordingly, military commanders by giving close and prompt attention to civil claims may avoid the harassment of a criminal proceeding.

Prompt settlement of civil claims can be expedited by liaison with insurance companies who may find an advantage in forestalling the filing of a civil-criminal action. Liaison with the claims authorities of the receiving state also is necessary because, under Article VIII, paragraph 5, of the Status of Forces Agreement, claims in favor of receiving-state nationals arising from acts or omissions

of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions:

(a) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.⁹⁹

The claims problems of the United States are not solved by this provision. On the contrary, the settlement of claims may be more difficult, particularly

⁹⁷ Sec. V, par. 4, Circular from French Minister of Justice (note 87 *supra*).

⁹⁸ See Rafalovitch, Tribunal Correctionnel de Fontainebleau, July 4, 1955.

⁹⁹ Note 4 *supra*. NATO Status of Forces claims arising in the United States are processed by the procedure set forth in Army Regulations 25-50, April 20, 1955.

if the procedures of the receiving state provide inadequate or infrequent remedies. If the claim arises out of tortious acts or omissions not done in the performance of official duty, the Status of Forces Agreement establishes the procedures for disposition, but the provisions of the Foreign Claims Act¹⁰⁰ provide authority for payment if committed by members of the force or civilian component, but not by dependents. Accordingly, the military commander, in order to avoid many criminal prosecutions, finds it advisable to publicize claims procedures and encourage their use by the local population in lieu of litigation. In so doing he must not violate United States statutes and regulations forbidding Government personnel from soliciting claims against the Government.¹⁰¹ The prohibition does not prohibit Government personnel, acting in the performance of their official duty, from furnishing assistance to claimants. Inquiries on how to file claims can always be answered, and simple assistance of a ministerial nature can be given freely in view of the purpose of the Foreign Claims Act to promote and maintain friendly relations with foreign countries. Because claims arising from the performance of official duty are, by the Status of Forces Agreement, filed, processed and adjudicated in accordance with the laws and regulations of the receiving state, they are not strictly speaking claims against the United States, and United States military authorities may properly inform a claimant that a remedy lies with the receiving state rather than in a court action against the United States or a member of the United States forces.

If the injury results from an act not committed in the performance of official duty and a criminal action is instituted in which the civil party is represented, military personnel may be reluctant to inform the injured person of the remedies provided to him by the Foreign Claims Act. However, it can be argued with some force that in view of the strong policy to avoid as far as possible the trial of United States personnel in foreign courts, United States officials are under a duty to furnish information to claimants so as to preclude the institution of criminal proceedings. This view is given additional support by the recent change in Army Regulations concerning information and assistance to claimants which specifies more clearly the assistance which can be supplied to claimants.¹⁰²

D. WAIVERS OF JURISDICTION BY THE UNITED STATES

A sending state is rarely requested to waive its primary right to exercise jurisdiction. United States military law does not provide specifically for the waiver of the exercise of court-martial jurisdiction, but in view of the waiver provisions in the Status of Forces Agreement it can be argued that a binding waiver of jurisdiction becomes possible because of the self-executing nature of the treaty. Regulations concerning the execution of waivers are

¹⁰⁰ 10 U.S.C. 2734. Provisions for the settlement of claims in both the Japanese Administrative Agreement and the NATO Status of Forces Agreement are pre-emptive as to the administrative settlement of all claims included therein.

¹⁰¹ 18 U.S.C. 283; par. 4, Army Regulations 25-20, March 7, 1956.

¹⁰² Par. 4b, Army Regulations 25-20 (*supra*), which superseded Special Regulations 25-20-1, May 31, 1951.

thus authorized by the terms of the treaty and could be appropriately promulgated by major military commands. However, because the precise effect of a waiver of jurisdiction by the United States has never been adjudicated, the question remains debatable, and no implementing regulations on this matter have been issued.¹⁰³

An even more difficult problem would arise if a waiver of the right to exercise jurisdiction were sought in the United States by a country which wished to assert its own military jurisdiction over a member of its own forces for an act subject to the primary right of the United States to exercise jurisdiction. What United States authority could grant a waiver of jurisdiction? A decision not to prosecute could be made by a District Attorney, but this would not preclude a grand jury from bringing an indictment. The only United States authority which can make a binding determination of jurisdiction is a court, and the reluctance of some State courts to grant a waiver can be imagined. An official request from the Department of State passed through the Department of Justice might be persuasive, but whether such a request would be considered binding has not been adjudicated. This question is not of theoretical interest only because foreign nations sometimes require evidence of reciprocity of treatment before according similar benefits to the United States.

VI. PRE-TRIAL PROCEDURES

Whenever a person is tried in a criminal court of the receiving state pursuant to the NATO Status of Forces Agreement, he is entitled, among other protections, to "a prompt and speedy trial."¹⁰⁴ Foreign jurisdictions have been severely criticized for slow trials and alleged excessive pre-trial confinement.¹⁰⁵ In France, although the pre-trial confinement of French nationals may be of longer duration than is normal in the United States, the pre-trial confinement of United States personnel has been kept to a minimum, largely due to the efforts of military commanders. Secretary of the Army Brucker, while General Counsel of the Department of Defense, testified with respect to this problem before the House Committee on Foreign Affairs:

that as a matter of practice our commanders in the field request that foreign authorities relinquish their custody of servicemen to the United States during pretrial periods. This is almost universally granted in Japan and in the vast majority of cases in all other countries.¹⁰⁶

If an accused is placed in pre-trial confinement by the receiving state, the thorough and impartial investigation required as a condition precedent to a general court-martial is difficult to accomplish. Because pre-trial con-

¹⁰³ USAREUR regulations only state that no waiver of the United States' right to exercise primary jurisdiction will be granted without the written approval of Headquarters, USAREUR. Par. 5j, AEZ Cir. Nr. 550-50, note 48 *supra*.

¹⁰⁴ Art. VII, par. 9, NATO Status of Forces Agreement, note 4 *supra*.

¹⁰⁵ Hearings Before a Subcommittee of the Senate Committee on Armed Services on the Operation of Article VII, NATO Status of Forces Agreement (1956), p. 25; Hearings (note 7 *supra*), pp. 11, 332; Time, Feb. 14, 1955, p. 6.

¹⁰⁶ Hearings (note 7 *supra*), p. 301.

incident in France is sometimes directed for the purpose of isolating the accused from witnesses while the investigating magistrate (*juge d'instruction*) completes an impartial investigation required by French law.¹⁰⁷ The investigation of the incident by military authorities is usually not immediately possible. Postponement of the investigation, however, is avoided by releasing the accused to military custody with the permission of the *juge d'instruction*. United States military authorities in France are requested to request that Army personnel in pre-trial custody be released to the custody of the United States authorities until trial.¹⁰⁸ If pre-trial custody of the accused is not released to the United States, records of the investigation by the French authorities may be secured pursuant to paragraph 6(a) of Article VII of the NATO Status of Forces Agreement, which requires that the authorities of the receiving and sending states assist each other in investigations and in the production of evidence.

An extensive pre-trial investigation characterizes criminal procedures of civil law countries. The result of the pre-trial investigation is the compilation of the *dossier* which contains statements by the accused, testimony of witnesses, observations of the investigating magistrate, and anything further pertinent to the case. The *dossier* is in the possession of the judge during the trial and its contents may be introduced in evidence. To properly protect the rights of United States servicemen, therefore, as much attention has to be given to the justice of the preliminary investigation as to the trial itself. Although the tendency has been to increase the protections accorded to an accused,¹⁰⁹ the preliminary investigation remains in France essentially an inquisitory rather than an accusatory proceeding which is under the direction of the investigating magistrate, the *juge d'instruction*. An accused may have counsel present at the preliminary investigation, but the rôle of counsel is generally passive and often a clerk is sent to observe the proceedings in place of counsel.

The United States requires that observers, who must be lawyers in all except some minor offenses, attend and prepare formal reports in all trials of United States personnel by foreign courts.¹¹⁰ Because the *dossier* is produced at trial, the essential fairness of a criminal proceeding cannot be determined unless the observer is thoroughly familiar with the *dossier* prior to trial and is aware of the circumstances under which it was prepared. Army policy in France requires that, in any preliminary investigation in which Armed Forces personnel may be charged with a serious offense, a qualified observer must be designated to attend the preliminary hearing and

¹⁰⁷ See Keedy, "Preliminary Investigation of Crime in France," 88 U. of Pa. L. Rev. 355, 392, 915 (1940).

¹⁰⁸ Par. 8d, AEZ Cir. Nr. 550-50, note 48 *supra*.

¹⁰⁹ Vonn, "The Protection of the Accused in French Criminal Proceedings," 5 Int. and Comp. L. Q. 1 (1956).

¹¹⁰ Sec. IX B, Department of Defense Directive 5525.1, Nov. 3, 1955 (Hearings, Pt. 2, p. 51), note 7 *supra*, provides:

"Trial observers [who will be lawyers] shall attend and shall prepare formal reports in all cases of trials of United States personnel by foreign courts or tribunals, except in offenses. . . ."

well as the trial and prepare a written report which can be utilized by the observer in an ensuing trial.¹¹¹

The rights of an accused at a preliminary investigation cannot be protected adequately without a competent interpreter. Because any statement made by an accused at a preliminary investigation will be evidence at the trial, to avoid contradictions and damaging inconsistencies, it is essential that the accused's statements be interpreted absolutely accurately. Paragraph 9(f) of Article VII of the NATO Status of Forces Agreement requires that whenever a person is prosecuted under the jurisdiction of the receiving state, he shall, if he considers it necessary, have the services of a competent interpreter. This has been construed to require that an interpreter be furnished by the receiving state at the preliminary investigation. In practice investigating magistrates and judges frequently accept the services of interpreters offered by United States forces. Experience indicates that these interpreters should, if possible, be Americans and, if not, at least from a community other than that of the place of trial.

Police in France may detain any suspect for twenty-four hours but he then must be brought before a *juge d'instruction*. If further pre-trial confinement is required, it is ordered by the *juge d'instruction*. Pre-trial confinement is normally employed where the offense charged would usually result in a sentence to confinement and it is necessary to isolate the accused from witnesses. If pre-trial custody of an accused is released to the United States military authorities, French authorities must be assured that the release of custody will not affect their right to exercise jurisdiction, and that the offender will be available to the French authorities for questioning upon their request. If it is determined that the right to exercise jurisdiction rests with the French authorities, the accused must be returned for trial. The Constitutional validity of this procedure in Japan was upheld recently in the case of *Cozart v. Wilson*.¹¹²

If pre-trial custody is released to the United States, an accused may not be further confined unless proper charges have been brought under the Uniform Code of Military Justice.¹¹³ The detention of civilian employees or dependents within the receiving state is more difficult because, as long as they remain in possession of their passports, they may leave the foreign country or they may otherwise sever their connection with the armed forces. Provided jurisdiction has not attached by virtue of an action prior to court-martial, these persons thus may by their own act remove themselves from military jurisdiction.¹¹⁴ Good faith requires that foreign authorities be informed of this possibility when release of such persons from pre-trial custody is sought.¹¹⁵

Service of Process

Personal service of process is not normally required to give a civil-law court jurisdiction. In France it is only required that a summons be left

¹¹¹ Par. 9c, AEZ Cir. Nr. 550-50, note 48 *supra*.

¹¹² Note 3 *supra*.

¹¹³ See Par. 20(e), Manual for Courts-Martial, 1951.

¹¹⁴ Par. 11d, *ibid*.

¹¹⁵ Par. 8d(3), note 48 *supra*.

at the gate of the military camp in order for it to be sufficient in French law. The traditional policy which forbade Army personnel from participating in the service of process was therefore unrealistic and only resulted in harm to the accused because jurisdiction had already been acquired, and the accused remained unaware of the pendency of an action.¹¹⁶ Furthermore, this policy appeared to conflict with the expressed views of the United States representative on the working group preparing the draft of the Status of Forces Agreement, who stated that if a military commander would not permit a process-server to enter his command,

the commanding officer . . . shall . . . serve such process . . . and . . . provide for the attendance of the person on whom such process has been served before the appropriate court of the receiving State.
 . . .¹¹⁷

Because delivery of a summons to an accused by the Army would not cure a defect insofar as the recognition of the judgment is concerned, and because jurisdiction according to the law of the forum had already been acquired, no advantage accrued from this previous policy. A recently approved change in regulations applicable to the Army provides that "military authorities shall co-operate with foreign officials in the service of process and other purely ministerial acts when required to do so pursuant to the provisions of an agreement between the United States and the applicable foreign country." (Unpublished opinion, JAGW^o 1956/8044, Oct. 29, 1956.)

VII. TRIALS IN FOREIGN COURTS

When a person subject to military law is tried before a foreign tribunal he must be accorded the procedural protections of the forum. In addition, an accused must receive the specific protections enumerated in the applicable jurisdiction agreement.

A. THE RIGHT OF CONFRONTATION

Article VII, paragraph 9, of the NATO Status of Forces Agreement lists among the rights to which an accused is entitled the right "to be confronted with the witnesses against him." The meaning of this phrase is sometimes misunderstood. Neither the treaty nor the minutes of the working group elucidate upon the meaning of the phrase "witnesses against him," although it may be construed broadly to include all witnesses whose testimony is presented to the court if its substance is hostile to the accused. The phrase

¹¹⁶ Unpublished opinion of the Judge Advocate General, Department of the Army, JAGW 1955/2305, Feb. 25, 1955, which states:

"There is no Federal statute providing for service by military personnel of process issued in a civil action by a domestic or foreign court. Although military authorities ordinarily will assist in facilitating service of process on members of the Army . . . by permitting process servers . . . to enter military . . . installations for the purpose and making military and civilian personnel available for service . . . the service of such process is not a function of the military . . . and may not properly be accomplished by the Department of the Army."

¹¹⁷ MS (j)-R (51) 5, Minutes of the Working Group, note 35 *supra*.

must, however, be analyzed in light of the practice in civil law to receive the official report of the investigating magistrate in writing rather than in person. The law of many of the NATO countries requires that the criminal courts attach probative value to this "*procès-verbal*" prepared by the investigating magistrate. In a study of the law of Luxembourg, but equally applicable in this respect to France, prepared at USAREUR headquarters, it was suggested that:

If the prosecution directs the attention of the court to a *procès-verbal* which the accused challenges on the ground that the official preparing it was not competent to investigate the matter related therein, or that the *procès-verbal* was null for some other reason, the accused should have the right to be confronted with the officials preparing the report, at least with respect to the limited question of its validity.

It is doubted, however, that the [Status of Forces] Agreement can be construed to confer upon the accused the right to be confronted with the official in question and to cause him to be interrogated with respect to the investigative acts which he performed and related in the *procès-verbal*. This conclusion is predicated on the rule obtaining in civil law countries that *procès-verbaux* are entitled to credence only with respect to matters personally observed and reported by the *verbalisant*; it recites the investigative acts performed by the official making the report. . . . Should the witness whose statement is recorded in a *procès-verbal* be hostile to the accused, the accused must be given an opportunity to be confronted with such witness. . . .¹¹⁸

The application of the right of confrontation is illustrated by the case of Pfc. Jerry O. Baldwin which arose in France soon after the Status of Forces Agreement became effective. Pfc. Baldwin and another American soldier were arrested by French police on the complaint of a French national, who alleged that he had been pushed from his bicycle by two American soldiers. At a hearing in August, 1953, before a *juge d'instruction* the victim and a witness were unable to identify the soldiers, but the *juge d'instruction* declared that a paper in his file indicated that Private Baldwin had confessed to the offense before American military police. This document was signed by an American provost marshal, a major who, it subsequently was determined, had neither seen nor spoken to Baldwin but had based his statement on a police journal. No military policeman appeared to substantiate the confession. At a trial before the *tribunal correctionnel* in Orleans no witnesses appeared and the accused denied the charges. The alleged confession was referred to, however, and Private Baldwin was found guilty and sentenced to a fine of 6,000 francs and costs. An appeal was made at the instance of the French Ministry of Justice on the ground that Baldwin had not been confronted by the witnesses against him. The *Cour d'Appel*, misunderstanding the reason for the appeal, believed it to be because the Ministry of Justice considered the original sentence too lenient, the normal reason for an appeal by the Government. Accordingly, on the basis of the same evidence, the *Cour d'Appel* affirmed the conviction and raised the fine to 12,000 francs (approximately \$36.00). Because the appellate tribunal

¹¹⁸ Luxembourg Law and the NATO Status of Forces Agreement, Headquarters, United States Army Europe, July 12, 1955, pp. 173-174.

directly compounded the error of the lower court, a new protest was sent to the Ministry of Justice through the United States Embassy in Paris. The French Foreign Office expressed its regrets for the error and the fine against Private Baldwin was remitted.¹¹⁹

In spite of the ordinary importance of the right of confrontation, cases have arisen in which the accused has found it advisable to forego the right. An impersonal written statement read by the court may be less damaging to an accused than the personal testimony of a witness whose passions and prejudices may be contagious.

B. TRIALS *IN ABSENTIA*

Criminal trials *in absentia* are permitted in most civil-law jurisdictions. Because an accused is usually placed in pre-trial confinement for serious offenses, trials *in absentia* are more often held for minor violations of the law. Although normally judgments rendered *in absentia* may be resopped on the merits for several years (five years in France), the judgment is valid until declared otherwise. No United States personnel have been confined as a result of a trial *in absentia*, and unless an accused has waived his right, it would appear that the criminal judgment rendered *in absentia* is contrary to the confrontation provisions of the Status of Forces Agreement.

French officials have recognized that trials *in absentia* and judgments by default do not satisfy the aims of their criminal law. The accused seldom has property in France subject to judicial execution and the criminal judgment is unenforceable in the United States.¹²¹ The French Minister of Justice, in a circular to public prosecutors, stated that, in view of the confrontation provisions in the Status of Forces Agreement, it was preferable to a trial *in absentia* to grant a release of jurisdiction and permit a trial on the merits where the accused could be present.¹²² •

C. EMPLOYMENT OF COUNSEL

Legislation now authorizes the Secretaries of the Army, Navy, Air Force and Treasury with respect to the Coast Guard, to prescribe regulations authorizing the employment of counsel and the payment of other expenses in respect to the representation before foreign tribunals of persons subject to United States military law.¹²³ This legislation made permanent a policy already in effect for all services.¹²⁴ The broad terms of the legislation per-

¹¹⁹ Hearings (note 7 *supra*), pp. 257-258.

¹²⁰ Several *in absentia* trials in France and Italy are listed at p. 299, Hearings, note 7 *supra*.

¹²¹ *Huntington v. Attrill*, 146 U. S. 657 (1892).

¹²² Sec. VII (5) SL 1344-3, Allied Forces Stationed in France Pursuant to the North Atlantic Treaty, note 87 *supra*.

¹²³ Act of July 24, 1956, 70 Stat. 630; implemented by Army Regulations 633-55, Aug. 24, 1956.

¹²⁴ Advice of Action of the Joint Secretaries, May 17, 1956, Subject: "Policy on Counsel Fees"; see also memorandum from the Secretary of the Army for the Assistant Secretary of the Army (M & R F), Feb. 2, 1956.

mit the employment of counsel at government expense even for non-criminal actions, if they are deemed of sufficient importance.¹²⁵

The assistance of counsel in foreign courts is facilitated by the system of public defenders which exists in many foreign jurisdictions. In France an accused is entitled to a court-appointed attorney whenever he so requests, and this attorney is forbidden to accept any fee from the accused for his services. Where an insurance interest is involved, it is frequently advisable for the accused to retain an attorney for himself even though the insurance company offers to supply counsel, because the attorney who represents the insurance company in the civil-criminal action may be more interested in a compromise than in defending the criminal charges. Because Continental lawyers are not bound to follow the dictates of their clients in the same manner as American counsel, the defense attorney may admit the guilt of an accused if he considers it in the best interests of his client, in spite of protestations of innocence from the client.

The services of a competent interpreter are frequently of greater value to an accused than an attorney. This is particularly evident in Continental courts, where the rôle of the attorney is more passive than in the United States and the judge questions the witnesses. The translation of legal concepts from one system of jurisprudence to another is a task that should not be entrusted to a person unfamiliar with the law, and interpreters adequate for normal conversations may be completely unreliable in a courtroom. The Status of Forces Agreement requires that the accused have the services of a competent interpreter, but experience has shown that court-appointed interpreters are sometimes incompetent.¹²⁶ The trial observer representing the United States military authorities accordingly is well advised to give close scrutiny to interpretations and, where required, make some effort to indicate early in the proceedings that the interpreter is considered inadequate. In this way a judge can usually secure a proper interpreter before embarrassing errors occur.

D. APPEALS

Perhaps the most intensely criticized aspect of French criminal procedure is the power of an appellate tribunal to make new findings of fact and reverse a determination of innocence made by a lower court. For example, judgments of the *Tribunal Correctionnel* may be appealed to the *Cour d'Appel* at the instance of the *Ministère Public*, the representative of the French Ministry of Justice. The judgment of the *Cour d'Appel* may increase a sentence imposed upon the defendant, and if the civil party is represented, it may increase compensation adjudged to him. However, a judgment of a *Cour d'Assise*, the court having jurisdiction over felonies, is reviewable for errors of law only, and its judgment may not be increased in severity. Procedure permitting the prosecution to appeal is not considered by foreign judicial authorities as placing an accused twice in jeopardy be-

¹²⁵ S. Rep. 2544, 84th Cong., 2d Sess., p. 4.

¹²⁶ Hearings (note 7 *supra*), pp. 298-299.

cause the action on appeal is considered a part of one continuous criminal action.

VIII. THE SENATE RESOLUTION

The Senate in giving its advice and consent to the NATO Status of Forces Agreement did not reveal what was meant by its desire that a waiver of jurisdiction be requested if an accused was not protected because of "the absence or denial of constitutional rights he would enjoy in the United States." Some opponents of the agreement conceived of the Constitution as a mantle protecting Americans everywhere from assumed injustice in all foreign jurisdictions. This view of Constitutional law has an emotional but not a legal foundation.¹²⁷ The Senate's resolution was implemented by the armed forces by requiring the presence of observers, ordinarily military lawyers, at all foreign trials of United States personnel covered by status of forces agreements. Observers must evaluate the essential fairness of the trial in the light of the Senate resolution.¹²⁸ To accomplish this, general criteria have been suggested on the basis of a study of United States Constitutional law. In Europe the Senate resolution has been interpreted as requiring that the essential fairness of a foreign trial should be measured by determining whether in that trial the accused is accorded the rights he would be entitled to in a State court of the United States by virtue of the United States Constitution through the 14th Amendment.¹²⁹ But what these rights are is not clear. The precise extent of the 14th Amendment's effect upon the principle of double jeopardy is not clear, for example, in the light of the *Brock* and *Palko* cases,¹³⁰ and it accordingly is difficult to determine when the Senate resolution requires a waiver to be requested, and diplomatic protest made, should the waiver be denied.

The usefulness of the 14th Amendment test has been demonstrated by experience, although no proper evaluation is possible without in addition a knowledge of the forum's substantive law and procedure. Country law studies prepared for countries exercising criminal jurisdiction over United

¹²⁷ In opposing the Status of Forces Agreement, Representative Bow of Ohio stated: "[Its] provisions abrogate the basic Constitutional rights of our American soldiers serving on foreign soil.

"This treaty repudiates one of America's oldest and finest traditions—that the American flag and the American Constitution follow our soldiers wherever they go."

Hearings (note 7 *supra*), p. 2; *contra*, cases cited *supra*, note 3; see also *Neely v. Henkel*, 180 U. S. 109 (1901); *In re Ross*, 140 U. S. 453, 464 (1891). The Congressional Record contains many criticisms; for example, see extension of remarks by Representative Dodd, 102 Cong. Rec. A 6726, daily ed., Aug. 20, 1956.

¹²⁸ Department of Defense Directive 5525.1, Nov. 3, 1955. Hearings (note 7 *supra*), p. 940.

¹²⁹ See a memorandum prepared by the Interservice Legal Committee convened by Hqs. U. S. European Command, submitted to the House Committee investigating the Status of Forces Agreement by Secretary of the Army Brucker, then General Counsel of the Department of Defense, as a summary of fundamental legal rights and privileges by which the foreign criminal procedures were to be measured. Hearings (note 7 *supra*), p. 249.

¹³⁰ *Brock v. North Carolina*, 344 U. S. 424 (1953); *Palko v. Connecticut*, 302 U. S. 319 (1937).

States forces are necessary source material for the observer. Skill in the language of the forum is, of course, invaluable. On the basis of the observer's report an evaluation of the foreign trial is made and if, on review of this report, an injustice is apparent or it is considered that fundamental rights are infringed, the military forces may request the Department of State to institute diplomatic overtures to secure a redress of the grievance. Only in the *Baldwin* case has such a formal procedure been necessary, and in that case the wrong was admitted.¹³¹

IX. THE OPERATION OF UNITED STATES COURTS-MARTIAL IN RECEIVING STATES

Special problems exist for courts-martial in countries where concurrent jurisdiction arrangements are in operation. Delay in bringing cases to trial results because of the necessity of determining in whom the primary right to exercise jurisdiction has vested or in obtaining a waiver of the primary right to exercise jurisdiction. Further delay sometimes results when authorities of both states have charges pending against the accused.

A United States court-martial in foreign countries lacks the power to subpoena and punish for contempt persons not subject to military law. This unsatisfactory situation is not resolved by the provision of the Status of Forces Agreement which provides that:

The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. . . .¹³²

It was evidently the intention of the drafters that this provision would require compulsory attendance of witnesses. The minutes of the working group reveal the following:

The Canadian representative requested that a provision should be included to make the presence of witnesses compulsory *also* [emphasis supplied]. After some discussion, the working group agreed that in paragraph 6a the words "and production of" should be added after the words "in the collection."¹³³

If it were the intention that power to subpoena rest with sending-state authorities, this intention has not been accomplished. In no country does domestic legislation grant to the military courts of sending states any authority or means to require compulsory attendance of witnesses or production of evidence. Instead, military courts must rely upon the comity of the receiving state. In Japan the difficulty is alleviated by an agreement by which Japanese authorities will issue a subpoena upon the request of United States authorities.¹³⁴

Without the power to subpoena nationals of the receiving state, the co-

¹³¹ Page 56 *supra*.

¹³² Art. VII, par. 6(a), NATO Status of Forces Agreement, note 4 *supra*.

¹³³ Par. 9 MS-R (51) 15, Minutes of the Working Group, note 35 *supra*.

¹³⁴ Agreed View Nr. 26, note 42 *supra*.

operation of the police and judicial authorities of the receiving state is necessary to secure the presence of witnesses. If a witness categorically refuses to appear at a court-martial, powers of persuasion are an inadequate substitute for legal process. This deficiency in the subpoena power renders matters of jurisdiction by the receiving state more difficult to secure if the receiving-state authorities believe that essential witnesses will not appear voluntarily before a military court of the sending state. Whether or not receiving-state authorities are aware that a reluctant witness exists, this factor will engender hesitancy on the part of the United States to press for a waiver of the right to exercise jurisdiction. It is unrealistic for courts-martial to operate without the subpoena power.

Legislation which could become effective in the United States by Presidential declaration provides that a United States District Court, upon the application of a service court of a friendly foreign force, shall issue a subpoena requiring the presence of a witness before a foreign military court operating in the United States.¹³⁵ This legislation, enacted during World War II, was implemented for the military tribunals of the United Kingdom and Canada only. However, the implementation of the Act was revoked by a Presidential Proclamation of August 5, 1955.¹³⁶

Assistance of receiving-state police in criminal investigations is absolutely essential in overseas areas because the employment of United States military police off base is restricted, and the right of a military commander to make searches and seizures is restricted by the Status of Forces Agreement. Outside the military base United States military police may be employed in NATO countries:

... only subject to arrangements with the authorities of the receiving State and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.¹³⁷

Conversely, receiving-state police do not have an absolute right to enter the military base as they did under the Brussels Status of Forces Agreement.¹³⁸ It was the intention of the drafters that receiving-state authorities should have neither the power to arrest nor to serve process upon sending-state personnel within a military base without the permission of the commanding officer of the base.¹³⁹ Although the police of the receiving state may be reluctant to investigate offenses over which the United States has exclusive jurisdiction, authority for their assistance can be found in the wording of paragraph 6(a) of Article VII of the NATO Status of Forces Agreement. Liaison and co-operation between United States military authorities and the investigating officials of the receiving state have been received favorably by the United States Court of Military Appeals.¹⁴⁰

¹³⁵ Act of June 30, 1944, 58 Stat. 645, 22 U.S.C. 703.

¹³⁶ Proclamation 3107, Aug. 5, 1955; 20 Fed. Reg. 5805; 33 Dept. of State Bulletin 362 (1955).

¹³⁷ Art. VII, par. 10(b), NATO Status of Forces Agreement, note 4 *supra*.

¹³⁸ Note 20 *supra*.

¹³⁹ Par. 16 MS (j)-R (51) 5, Minutes of the Working Group, note 35 *supra*.

¹⁴⁰ U. S. v. DeLeo, 5 U.S.C.M.A. 148, 17 C.M.R. 148.

CONCLUSION

That the NATO Status of Forces Agreement and similar jurisdictional arrangements are inconvenient from a strictly tactical viewpoint is revealed by both their complexity and the testimony of military men.¹⁴¹ However, military considerations cannot be divorced from political realities and accordingly General Gruenther, in a message to the Chairman of the House Foreign Affairs Committee, stated:

In my opinion, the denunciation of the Status of Forces Agreement . . . or any insistence by the United States for a major revision of this agreement would so undermine the spirit of the alliance as to cause its serious deterioration with the gravest consequences to the essential security of our country.¹⁴²

The North Atlantic Treaty and other collective defense agreements form the foundation of our military security. The success of the principle of collective security, to which the status of forces agreements contribute strength, is dependent upon alliances with sovereign nations, not satellites. As long as United States personnel are not in fact subjected to unfair treatment or incarcerated for acts or under conditions violative of our own principles of justice, the NATO Status of Forces Agreement and its corollaries are in the best interests of United States security. Largely due to the vigilance of military lawyers, these agreements, in spite of their many problems, operate effectively and achieve substantial justice.

¹⁴¹ Hearings (note 63 *supra*), p. 19.

¹⁴² Hearings (note 7 *supra*), p. 946.

EDITORIAL COMMENT

LEGAL RESEARCH ON "PEACEFUL CO-EXISTENCE"

Eastern European states began in 1954 to urge joint legal research between East and West on what they chose to call "peaceful co-existence." By 1956 they had succeeded in having the subject placed on the agendas of several international associations of scholars to which considerable numbers of Americans belong. Their success was great because it had been resisted at many points by Westerners who wanted to substitute a topic to be called "peaceful co-operation" for the Eastern European favorite, but the persistent pressure of Eastern European states for their version has resulted in the capitulation of lawyers from other lands. "Peaceful co-existence" is to be discussed, even though no one has yet made explicit what is to be the subject to be analyzed. If lawyers in the non-Soviet world are to take an informed stand on the matter, it is necessary to determine what is meant by what seems to have become the number one research topic of our time.

The Eastern European campaign began at the General Conference of UNESCO in 1954 following the introduction of a draft resolution by India, whose delegates seem to have given no thought to the preferability of "peaceful co-existence" or some other term.¹ In consultation with delegates from various non-Eastern European states the Indians agreed to substitute the words "peaceful co-operation" in their resolution for the words "peaceful co-existence," and it was in the revised form that the General Conference accepted the subject as a topic for UNESCO-supported research.² Yet the Eastern European states, which had found it necessary to support the revised version to prove their new amiability, soon indicated

¹ For the debate at the General Conference of 1954, see UNESCO, Records of the General Conference, Eighth Session, Montevideo, 1954, Proceedings, pp. 423-431, 482-483, 507-509.

² Resolution IV.1.3.411. See UNESCO, Records of the General Conference, Eighth Session, Montevideo, 1954, Resolutions: "The General Conference, Bearing in mind the objectives of UNESCO as defined in its Constitution and as reiterated in resolution 0.10 'Action in the Service of Peace,' adopted by the General Conference at its sixth session; Recognizing that international tensions are impeding the realization of these objectives; Declares its faith in the possibility of resolving all tensions by peaceful means through the exercise of restraint, tolerance, understanding and good will, Recommends that all Member States encourage respect for justice, for the rule of law, and for the human rights and fundamental freedoms which are affirmed by the United Nations Charter and the UNESCO Constitution for the peoples of the world, without distinction of race, sex, language and religion, and that they direct their attention to gaining recognition for the ideas of living peacefully together, of understanding and cooperation among all nations, whatever their differences, while recognizing the principle of self-determination; Recommends that Member States encourage the development of educational policies that will lead to effective realization of the aims mentioned above, and Authorizes the Director General to undertake an objective study of the means of promoting peaceful co-operation in accordance with the aims expressed in the UNESCO Constitution."

their dissatisfaction with the term "co-operation," and they began to work hard for restoration of "co-existence" in the documents prepared in accordance with the authorization granted by the General Conference's resolution.

The Eastern Europeans' first opportunity to reverse the General Conference came when the various UNESCO-sponsored international associations of scholars met in the wake of the General Conference to determine the contribution each might make to develop the theme of the resolution. In these meetings the term "co-existence" reappeared. The round table organized by the International Political Science Association in Stockholm August 20-30, 1955, seemed to have been almost ignorant of the discussion carried on at the General Conference over the choice of the term defining the goal of the research. In his report of discussion the *rapporteur* stated the purpose of the meeting to be consideration of "the particular contribution that political science might make to the study of peaceful co-existence."³ In his abbreviated report in UNESCO's International Social Science Bulletin he used the same term.⁴

Some of the political scientists present at the round table seem to have sensed the issue which had been before the 1954 General Conference in phrasing the resolution, for the report indicates that a discussion was begun at the first meeting over the meaning of "co-existence." A distinction was drawn between co-existence without collaboration on the one hand, and active co-operation between states on the other. Because of the sharp variation in views as to whether co-existence meant only a middle path between open conflict and cold war or whether it meant completely harmonious relations, the matter of definition was put aside in the hope that discussion of precise subjects for study would clarify the various definitions and conceptions of the central theme.

The economists, in selecting through the International Economic Association subjects which they thought suitable for discussion under the General Conference's resolution, avoided the problem of definitions, but one of their themes suggested that they were thinking more in terms of dynamic efforts to bring the world together than in terms of passive non-interference. This theme was phrased as

types and degrees of economic collaboration between nations and their economic effects: trade, exchange of scientific knowledge and technicians, migration of workers, capital movements.⁵

The battle of definitions re-emerged when law professors of East and West met at UNESCO House in Paris February 17-21, 1956. The call for the meeting had been phrased in terms identical with that of the resolution of the UNESCO General Conference, but the Eastern European delegates united at the outset behind the request of the Polish professors that the

³ See Doc. UNESCO/SS/Coext./2, Paris, Nov. 24, 1955.

⁴ See 8 International Social Science Bulletin 196-197 (1956).

⁵ The themes suggested by the International Economic Association were circulated at the conference of the International Association of Legal Science in a document without reference number.

meeting select for discussion a theme relating to problems of co-existence.⁶ Being aware of the history of the debate at the General Conference of 1954 and of the careful choice of the word "co-operation" rather than "co-existence," the delegate sent by the American Foreign Law Association urged that the meeting hold to its terms of reference and continue to use the word "co-operation" as indicative of its desire to further research designed to aid a dynamic effort to find a means of working together rather than to support what seemed to be implied by "co-existence," namely, a passive condition of live and let live.

Faced with the argument that the resolution under which the lawyers were meeting called for aid to co-operation rather than to co-existence, the Eastern European delegates found it necessary to accept the dynamic word, and one of the proposed themes for legal research was phrased as "Sovereignty and international co-operation," but the Eastern European delegates remained unhappy. The representative of the U.S.S.R., Professor Eugene A. Korovin, went home to write his report on the meeting, and he used the opportunity to ridicule the efforts of the American representative to have the meeting choose a theme relating to peaceful co-operation rather than peaceful co-existence.⁷ He suggested that the American representative was possibly remembering "that Secretary of State Dulles had said that 'co-existence' was a word to be shied at, to be on one's guard against." He argued that the American was trying to avoid a discussion of the relations between countries belonging to different systems, but he made no mention of the fact that the American Foreign Law Association had proposed just such a discussion in the sphere of commercial relations which have been plagued by legal problems arising out of the failure to find solutions of the conflicts which have arisen between states having differing economic systems. The American delegate was taking no narrow position against research on touchy subjects, but urging only that co-operation rather than co-existence must be sought because international tension has proved to be hard to alleviate if one adheres to the narrow concept of sovereignty in the reduction of barriers in the interest of co-operation to facilitate international intercourse.

The Soviet delegate seems to have appreciated the strength of the argument presented by those outside the orbit of Soviet influence, for in his public report Professor Korovin suggested that his government really did not care which word was used. He said:

We had no objections to "peaceful cooperation," since it is the active form of "peaceful coexistence," and therefore fully accords with the policy of the countries of the socialist system.

He then tried to turn his graceful retreat into a victory by saying that the American delegate

⁶ An account of the debate is set forth in John N. Hazard, "International Tensions and Legal Research," 9 *Journal of Legal Education* 29-38 (1956).

⁷ See Eugene A. Korovin, "The UNESCO Jurists Conference," *New Times*, No. 15 (April 5, 1956), pp. 20-23.

may not have intended it, but the outcome of his effort was that the decisions of the Paris meeting of legal experts popularize the more active form of peaceful coexistence.

Since that was the very aim of the American, it is perhaps enough to let the matter rest with the realization that in the alleviation of tensions it is often desirable to accept the appropriation of one's thesis by the other side even when the other side tries to dissociate the theme from its original proponents and to take all credit for its presentation.

If the Soviet side had finally become convinced at Paris that what was desired was research in co-operation rather than co-existence, this fact was concealed when the specialists from various international learned societies met in Geneva in July, 1956, to select topics for interdisciplinary research under UNESCO's auspices.⁸ The meeting, which on this occasion included no lawyers from the American side, accepted two topics, the first of which reflected the by now historic struggle for a term which would establish in a single word the theme of the UNESCO program of research. The final theme compromised this dispute by supporting both sides in spite of the wording of the 1954 General Conference's resolution to which the Geneva Conference was supposed to be providing the implementation. The theme as it came from Geneva was stated to be "The general theory and historical evolution of co-existence and peaceful co-operation."

Having succeeded in reversing the decision of the 1954 General Conference to exclude "co-existence" from the topic for research, the Eastern European lawyers spread their campaign into other associations of international lawyers. A Sixth Congress of the International Association of Democratic Lawyers, held in Brussels from May 22 to 25, 1956, with representatives from 34 countries, had on its agenda as its first subject of discussion "The United Nations Charter as legal basis of peaceful co-existence."⁹ Since this association has long evidenced its affinity for views supported by Soviet delegates, the Soviet victory in the phraseology of the topic is not surprising.

Eastern European lawyers appeared for the first time at a meeting of the International Law Association held in Dubrovnik, Yugoslavia, from August 26 to September 2, 1956. Although appearing only as non-voting guests, the Eastern European delegates indicated the interest of their learned societies in joining the Association and in placing upon its agenda for its conference of 1958 the theme of legal problems arising in furtherance of peaceful co-existence.¹⁰

In the light of the record it is evident that international lawyers will be

⁸ For the minutes of the meeting see Doc. UNESCO/SS/Coop/16, Paris, Aug. 8, 1956.

⁹ See International Association of Democratic Lawyers, Bulletin No. 28, July, 1956.

¹⁰ The proceedings of the Dubrovnik conference of the International Law Association will not appear for some time. The influence of the Eastern European delegates upon some members of the conference is indicated by a letter from William Lathey to the Editor of *The Times* (London), who compared the occasion in Dubrovnik with the efforts of the Nazis between the wars to control the activities of the International Law Association by mass votes. See Letters to the Editor, *International Law*, *The Times* (London), Sept. 21, 1956.

asked in coming months to explore the theme of "peaceful co-existence," for it is already on the agenda of UNESCO, the International Association of Democratic Lawyers and the International Law Association. The subject has not yet been officially defined, but there have been indications of what the Eastern Europeans want to discuss. These indications bear examination by those who plan to participate in the projected research of the international associations to which large numbers of Western lawyers belong, so that their work will be responsive to the issues which can be expected to appear in the papers of their colleagues from Eastern Europe.

Even though the research is supposed to be in the legal field, a political theme can be expected to emerge as the underlying concern of Soviet lawyers, if an editorial in the authoritative Soviet journal, *International Affairs*, is accepted as pointing the way for Soviet specialists.¹¹ In praising the results of the Franco-Soviet talks of the summer of 1956, the authors say that the talks were an important contribution to the development of international relations based upon the fact that countries with differing social systems must not simply exist side by side, but can and must improve their relations, strengthen their mutual confidence and seek a basis for co-operation. The editors seem to have adopted the active form of co-existence by this statement and to have come out for co-operation as well as a policy of live and let live.

Yet, when the reader proceeds further in the Soviet editorial, he finds that the principal block to peaceful co-existence in the Soviet view is stated as "the Western Powers' adherence to the 'positions of strength' policy." The Soviet representatives at the talks were said to have expressed their opposition "to the policy of military line-ups in Western Europe and the Middle East, the remilitarization of West Germany, etc." The Soviet representatives are said to have agreed with the French on the necessity of continuing efforts to reach agreement within the United Nations on urgent measures for the reduction, under international control, of armed forces and armaments, above all the armed forces of the five Great Powers.

Although espousing the extension of economic aid, the editorial writers say that the United States is using its aid to interfere in the internal affairs of the recipients and to establish imperialist domination. The editors call for an end to such aid. The editors then discuss the regional problems which came before the statesmen, and choose to criticize Secretary Dulles' scepticism over Soviet policy in the Middle East. Finally, the editors urge extension of trade, and cultural, scientific and technical exchange through the drafting of a cultural convention.

If the Soviet editorial on peaceful co-existence can be taken as an example of what Soviet scholars will say before meetings of international learned societies, it can be assumed that there will be an undertone which has become well known to those who follow Soviet pronouncements in the United Nations. The policy of the United States and of its allies will be selected as a policy which must be changed in the interest of co-existence,

¹¹ See "An Important Contribution to Peaceful Coexistence," *International Affairs*, No. 6 (1956), pp. 12-16.

while the Soviet policies which have given rise to defensive measures among Western and Asian states seeking to protect themselves from Soviet inroads will be overlooked or described in terms suggesting that they lead to peace. Yet the editorial suggests some possibly fruitful fields for research in declaring the necessity of cultural conventions and expanded trade. Here is work for lawyers who need to take into consideration the complexities created by the application of traditional rules of international law which were forged years ago in a world where cultural relations were not at the complete mercy of governments and where trade was primarily between private enterprisers who could claim no immunity from suit.

Soviet expectations of what should be discussed under the co-existence theme are further clarified in the study outline prepared by the International Association of Legal Science in UNESCO House in February, 1956.¹² Emphasis was upon "sovereignty" as the legal basis for co-operation between states of different systems. Attention was directed to the United Nations Charter as the embodiment of the principle, and research was to be directed to a determination of the extent to which states Members of the United Nations have reserved sovereignty to themselves in spite of their international obligations, and the extent to which regional pacts may function within the United Nations pattern.

The study outline on peaceful co-existence then suggests that research be directed to restrictions upon sovereignty which have been accepted by states either voluntarily or by custom in such spheres of political activity as have been made the concern of various international organizations, and in the application of foreign law to commercial matters, the acceptance of commercial arbitration to settle disputes and in the acceptance of responsibility for commercial transactions in foreign trade. Finally the outline proposes study of international legality as the basis of co-operation between states, with detailed consideration of the relationship between the principle of *pacta sunt servanda*, the clause *rebus sic stantibus* and the notion of "*bonne foi*."

The study outline must be regarded as less than what the Soviet representatives may hope to discuss in future conferences because it was the product of joint effort by Western as well as Eastern scholars, yet it suggests that there is to be recognition of the concept of limited sovereignty as a contribution to international co-operation, and once this principle is recognized, those who conduct the research can produce much material of recent years to prove that any narrow idea of sovereignty such as was found in the nineteenth century has already been submerged in the international agreements and custom of the twentieth.

Further evidence of Soviet intentions in development of the research programs on peaceful co-existence was presented in September, 1956, in the first article written with apparent reference to the adoption by various international associations of the theme of co-existence for their respective congresses. One of the editors of the principal journal of the Law In-

¹² The study outlines have not been published but are a part of the documentary record of the conference available in the files of the American Foreign Law Association.

stitute of the Academy of Sciences of the U.S.S.R. has taken cognizance of the decisions of spring and summer, 1956, by UNESCO, the International Law Association and the International Association of Democratic Lawyers to initiate a study of the legal problems arising in peaceful co-existence. In his leading article he sets forth the subjects which he thinks require discussion between capitalist and socialist states.¹³

Legal theory is placed first as a problem for research. The author asks that lawyers from East and West raise the basic question whether general international law is possible at all in regulation of relations between states of two such antithetical social systems as the capitalist and socialist. He says that he raises the question because bourgeois theorists have recently been asserting that the division of the world into two systems has made impossible existence of general international law. He finds, however, that the majority of bourgeois legal theorists have concluded that in spite of the division of the world, general international law is possible and has a basis for existing. He indicates the conclusion of himself and his colleagues in the U.S.S.R. that general international law is possible as a means of regulating relations between states regardless of their social systems.

To take his position that general international law is possible, the Soviet editor has found it necessary to explain that there has been complete repudiation within the U.S.S.R. of the view of Professor Eugene A. Korovin that there are two kinds of international law, capitalist and socialist, and a third area in which it could be said that there is a correspondence of the norms of the two systems. He concludes that the majority of Soviet jurists, in spite of disagreement on important details of international law, nevertheless agree that general international law exists at the present time, can exist and has to exist to regulate relations between all states regardless of their social systems. He finds this the logical consequence of the conclusion that at this time there can be peaceful co-existence of states belonging to two antithetical world systems.

As if to retort to those in the West who have treated co-existence as implying too passive a form of relationship, the Soviet editor declares that:

Of course, peaceful co-existence of states with different social-economic systems includes co-operation between them: without co-operation peaceful co-existence is senseless.

The victory of the Westerners seems complete in their effort to expand international legal research beyond the previously held narrow conception of co-existence as live and let live. On that score it may be assumed that there can be attention to legal problems of resumed relations between East and West and not just consideration of means of preventing aggression.

The Soviet scholars are not apparently prepared to give up their propaganda for socialism, for the editor repeats the familiar argument that the capitalist world preserves the economic basis for war, while substitution of public ownership for private ownership has created the foundation for

¹³ See G. I. Tunkin, "Peaceful Coexistence in International Law" (in Russian), *Sovetskoe Gosudarstvo i Pravo*, No. 7 (1956), pp. 3-13.

peace in socialist countries. In reflection of Nikita Khrushchev's declaration at the Twentieth Communist Party Congress in February, 1956, the Soviet editor declares that, under conditions of the present time, the fundamental conflicts of capitalism do not create the fatal inescapability of war because there are powerful objective and subjective factors leading in the direction of peaceful co-existence. Peace is dictated, so the Soviet editor believes, by appreciation that war would be so destructive that mankind would no longer consent to the continuation of the capitalist system. He points also to the need for mutual co-operation of states because of the increasing interrelationship of economic and cultural factors, and he believes that such economic relationships will develop peaceful relationships. Finally he believes that, with the increase in the number of states as nationalism takes its toll of empires, and with development of working-class movements in capitalist countries to weaken control by capitalist rulers, there will be further impetus to strengthening and progressive development of general international law.

The Soviet editor naturally does not comment on problems faced by the rulers of his own camp. Perhaps he could not have foreseen the wide expansion in subsequent months of nationalism within the Eastern European states, and the emergence of courageous and vocal groups of young liberals willing to fight to prevent their rulers from continuing to regiment Eastern European populations in the Soviet pattern. It was certainly not the expectation of Soviet Communist Party chiefs that they would soon have to demonstrate that their version of co-existence was applicable only to those parts of the world which were beyond the reach of their military might.

Events of October, 1956, have indicated to the world that the U.S.S.R. is as much in need of peace today as any part of the world because of the rumblings within the states on which she relies for economic and political support and for strategic bases for her own military plans. This fact suggests that Soviet rulers have reason to espouse international law not only to win friends among the noncommitted peoples of Asia and Africa, but also to assure international stability for a sufficient time to permit Soviet strategists to attempt to regain lost friends and restore Soviet power throughout Eastern Europe.

Soviet international lawyers can be expected to continue to demand research on problems of co-existence, because a policy of non-interference in areas of Soviet influence is essential to Soviet well-being. This does not mean, however, that Soviet lawyers can be expected to go so far as to participate in discussion of world law. Soviet experts fear such a development because they think it would lead inevitably to the creation of a super-state to enforce world law, and such a state they could not hope to dominate. This is the position of the Soviet author who describes the research necessary in the interest of co-existence. He has nothing but criticism for those in the West who have been arguing that international law must inevitably be replaced by something stronger.

Soviet scholars have too long consecrated their efforts to advancement of the foreign policy of the U.S.S.R. to depart at this point from polemics in

whatever they do. The editorials from *Pravda* are always part of the Soviet scholars' preparation for international conferences. Yet, the Soviet Government is facing difficulties greater than it has faced since the collectivization drive of the 1930's and the second World War of the 1940's. Under such circumstances it is conceivable that some value can be found for the West in the proposed joint research on "peaceful co-existence," but it must necessarily fall within strict limits. Any Western proposal that might be thought by Soviet scholars to undermine the Soviet position in that part of the world in which she has established her supremacy will be resisted. "Peaceful co-existence" as the Soviet lawyers think of it means as a minimum the condition necessary to keep non-Soviet power from penetrating into the Soviet orbit. It may also mean the relaxation of barriers to Soviet propagation of her ideas and influences across the frontiers of her orbit. There is yet little to suggest that Soviet members of international organizations intend to advance research projects which seek to explore the opportunities for co-operation without thought to improving the position of the Soviet camp at the expense of other camps.

JOHN N. HAZARD

THE LEGAL ASPECTS OF "NEUTRALISM"

It is an extraordinary reversal in the affairs of nations that we are witnessing these recent years. A generation ago a majority of the American people were proclaiming not only the right of the United States to remain aloof from any collective efforts to prevent the war then threatening in Europe, but the duty of Congress to forbid American citizens to do the things that neutral states had always had the right to do, lest by chance the act of individuals might come to influence public opinion, or, it might be, the United States would be led against its will to defend its neutral rights and be drawn into war as a result of maintaining its right to stay out of it. To many of the neutrality advocates of 1935-1939 it was not only futile as a practical matter to attempt to fortify the League of Nations as an agency of collective security, it was logically impossible to distinguish between right and wrong in international relations. The subtleties of national policy in Europe were too complex to tell who was the aggressor and who the victim. The only policy for the United States was to follow the advice of Washington and of Jefferson and to keep out of it all.

In strange contrast with all this, responsible spokesmen for the Government of the United States, and doubtless a corresponding body of public opinion, have been of recent months blaming certain states not for wanting to keep out of war but for wanting to keep out of collective security, such as it has developed since the establishment of the United Nations in 1945. A new term, "neutralism," has been created to describe the position of such states, and it will doubtless be entered in the lexicon of international affairs as soon as lexicographers are more sure what it means. At any rate, it does not mean what "neutrality" meant in 1914 or in 1939.

When the Charter of the United Nations was signed at San Francisco in

1945, it was clearly the belief of the great majority of the delegates that collective security was a workable system, that the combined strength of the international community, as called upon by a decision of the Security Council, would be able to keep the peace. There might, indeed, be difficulties in securing a decision of the Security Council, inasmuch as five of its members were given the right of veto. But difficulties were, in this case, not doubts, certainly not doubts widely entertained; and the general understanding was that peace could be maintained by collective measures to suppress acts of aggression.

But within less than five years it was clear that there was no such unity in the Security Council as to justify the anticipation of concerted action to maintain the peace. Not only had the United States and the Soviet Union developed between them such sharply divergent policies, but new instruments of destruction had been invented which gave an almost decisive advantage to a surprise attack—instruments so devastating in their effects that a state which was unfortunate enough to be the victim of aggression, or to go to the aid of other victims of aggression, might be completely wiped out in the course of being rescued or assisting in the rescue of others. Certainly, that might well be the fate of states lying in the path of the great Power from which the act of aggression might be expected to come. The price of resistance to aggression might thus be too heavy to pay. Bravery in such a case would be little more than patriotic suicide. Hurtful as it might be to national pride, it would be better to survive in the hope that one day the act of aggression might be outlived or overcome by moral forces from within. In other cases, where the menace of a devastating attack might appear less threatening, domestic problems could be so acute as to prevent the state from taking sides in the war without the risk of disrupting its national economy and possibly encouraging outbreaks of domestic violence.

Thus the policy of "neutralism" developed, and one may imagine the neutralist government saying to itself: "We are loyal members of the United Nations, but things have turned out differently from what we expected. Under the new circumstances there is nothing left for us to do but to stand aside and not take part in the struggle between the two contending great Powers of the United Nations. The security we had in mind when we ratified the Charter was a collective security, in which the community as a whole would be so strong that no single state would dare challenge its decisions. The situation has now become one in which the rule of *rebus non sic stantibus* clearly applies. We may be acting unwisely from a political point of view; but whether acting wisely or unwisely we do not consider that we are violating the pledge that we gave in ratifying the Charter."

Is, in fact, neutralism in violation of any legal obligations under the Charter? The Charter makes the Security Council primarily responsible for the maintenance of peace; and by the following article the Members of the United Nations agree to accept and carry out the decisions of the Security Council. But inasmuch as the Security Council has been unable to come to a decision in respect to any of the successive issues that have

arisen in connection with the maintenance of the peace, it would appear that the other Members of the United Nations not involved in the immediate issues of the "cold war" are legally free to declare themselves neutrals without violating their obligations under the Charter.

Can neutralism be condoned in the presence of a decision of the General Assembly condemning a particular Member of the United Nations for conduct in violation of the principles of the Charter? Is, indeed, a resolution of the General Assembly of any binding force? Is it no more than a recommendation, to be followed or not according to the convenience of the particular Member? The answer would seem to depend upon the terms of the resolution. On November 3, 1950, the General Assembly adopted a resolution that, in the case of failure of the Security Council to act, the General Assembly should consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including the use of armed force when necessary, to maintain international peace and security. The resolution, known under the title, "Uniting for Peace," was adopted by a vote of fifty-two to five, with two abstentions. Did it thereupon bind not only the Members voting against it, but the two Members abstaining? Were the two Members free to follow a neutralist policy and not consider themselves under any obligation to carry out the measures proposed by the General Assembly, on the ground that its recommendations were of no legal value? The answer would seem to be^o that the resolution constituted a binding obligation upon one and all.

On November 2, 1956, the General Assembly adopted a resolution introduced by the United States urging the parties involved in hostilities in Egypt to agree to an immediate cease-fire; calling upon the parties to the armistice agreements to withdraw their forces behind the armistice lines; and recommending that all Members refrain from introducing military goods into the area of hostilities and from any acts which would prevent the implementation of the resolution. It would appear that the third item of the resolution created an obligation under the Charter for the Members of the United Nations not parties to the conflict. That the obligation was not of equal legal force with one resulting from a decision of the Security Council to the same effect may be conceded, without at the same time denying the existence of the obligation. In international agreements, such as the Charter of the United Nations, where the sanction for non-fulfillment of obligations is left to the future decision of the Members themselves, there may be obligations of greater or less binding force, yet all be of a legal character, being obligations under a treaty.

In the case of the resolution of November 3 directed against the use of force by the Soviet Union against Hungary, the call to the Members of the United Nations to co-operate with the Secretary General in the execution of his functions and to co-operate in making available such supplies as might be required by the Hungarian people created such vague and general obligations as to raise no present issue of fulfillment of the duties called for by the resolution.

Beyond the obligations created for the Members of the United Nations by decisions of the Security Council or by recommendations of the Gen-

eral Assembly are, of course, the obligations created by the agreement of the Members to abide by the general purposes and principles proclaimed in the Charter, such as the principle of the self-determination of peoples, respect for human rights and fundamental freedoms, and the duty to refrain from the use of force. Here we are dealing with such broad obligations as to make it difficult in many cases to pass upon the conduct of states which hesitate to take sides between the two contending Powers in the "cold war" that has been in progress for the past eight years or more. The term "moral obligation" might be used to describe the conduct called for in such cases where there is no judicial procedure established to give judgment with respect to the observance of the rule, so that the decision becomes a matter for the discretion of the individual state; and the claim of one party that there is a moral obligation to take sides may in good faith be rejected by the other party. The distinction between Communist imperialism and democratic self-government is clear enough to the Western world, but not so clear to many of the Middle and Far Eastern states. Communism, as the West sees it, is condemned not because of its economic and social objectives in themselves, but because of its denial of human liberty, because of its methods of terrorism and intimidation, because it seeks to attain its objectives by measures which destroy moral values of far greater importance than any economic gain could justify. Imperialist Communism denies the right of self-determination, the basic condition of the sovereign equality which is one of the first principles of membership in the United Nations.

To many of the peoples of the Middle and Far East, Communism appears in a somewhat different guise. To the masses who have never known free government the promise of a higher standard of living is sufficiently alluring to offset the methods by which it is brought about. The Western concept of individual initiative and of controlled capitalism does not fit in with their experience of colonial or semi-colonial government. In most cases their economic need is sufficiently great to risk their political future. When, therefore, the Western world asks them, "Are you with us or are you against us in this 'cold war'?", the reply might be that the line between Communism and democracy is not so clearly drawn as to make the choice a simple one between black and white.

The political situation within the United Nations appears to be changing rapidly, so that observations with respect to the political aspects of "neutrality" may be out of date before publication. But the legal aspects of the problem continue to be of importance, involving as they do questions of interpretation of the Charter, particularly in respect to the obligations created for the Members by recommendations of the General Assembly.

C. G. FENWICK

ARTIFICIAL SATELLITES: A MODEST PROPOSAL

Announcements in 1955 by officials of the United States and the Soviet Union of plans to launch artificial satellites into outer space for the purpose of scientific investigation during the International Geophysical

Year 1957-1958 have given added impetus to the already considerable discussion and speculation concerning the legal status of the outer space expanses.¹ More recently, a story in the *New York Times*² reports new scientific findings that it may now be possible to construct satellites which can safely survive the return trip through the earth's atmosphere. This development perhaps calls for some further consideration of some of the rather complex problems posed by man's new ventures into outer space. Until the appearance of the recently reported findings, it had been widely assumed that the International Geophysical Year satellites would return intact to the earth. It was thought that a satellite, which sooner or later must begin to spiral toward the earth's surface, would heat up and burn like a meteor when encountering the denser atmosphere surrounding the earth. Now, however, it appears that the analogy to meteors was not wholly accurate and that satellites can be constructed which will withstand the heating effect of impact with the denser atmosphere closer to the earth's surface.

It hardly requires mention that the satellite program will most probably make highly significant contributions to the world's scientific knowledge. The major emphasis of the President's announcement of the satellite program as part of the United States' participation in the International Geophysical Year was upon the opportunities which would accrue to scientists of all nations throughout the world. Among the major contributions to science expected from the satellite programs are data relating to: data derived from: solar radiation in the ultraviolet and X-ray regions; electron density measurements; pressure, density and composition of the atmosphere; cosmic ray measurements; observations of meteors; measurements of the variation of the earth's magnetic field; atmospheric density measurements; geodetic measurements, etc.³

Prior to the recent development concerning the possibility of constructing a recoverable satellite, it had been assumed in most discussions that nothing in conventional or customary international law would be infringed by the satellite program.⁴ With respect to outer space it seems clear that there are no existing relevant conventional prescriptions.⁵ The principal conventions relating to airspace were not designed to regulate

¹ The U. S. announcement was made July 29, 1955. For text see 33 State Dept. Bulletin 218 (1955) and *New York Times*, July 30, 1955. First indication of the Soviets' intent to launch a satellite came on April 15, 1955, with the report that a committee of Soviet scientists had been established to pursue this objective. More recently, in September, 1956, the U.S.S.R. presented a brief report of its intent to the Special Committee for the International Geophysical Year at a meeting in Geneva. It announced that its detailed program of participation in the satellite phase of the International Geophysical Year would be presented later.

² *New York Times*, Dec. 2, 1956, Sec. E, p. 11, col. 7.

³ Some indication of the scientific purposes to be served can be gathered from the various reports in the *New York Times*, July 30, 1955. And see Van Allen (ed.), *Scientific Uses of Earth Satellites* (1956). ⁴ 1956 A.S.I.L. Proceedings 84-115.

⁵ Jenks, "International Law and Activities in Space," 5 Int. and Comp. L. Q. 60 (1956); Cooper, "Legal Problems of Upper Space," 1956 A.S.I.L. Proceedings 51; Schachter, "Who Owns the Universe?," *Collier's*, March 22, 1952, p. 36.

the problems of outer space. Neither the major purposes nor the detailed provisions of these existing agreements were, or can be, expected to deal with this new area of concern. As Mr. Wilfred Jenks has pointed out, the projection of territorial sovereignty upward, which is the basis of conventional law concerning airspace, has no reality when applied to outer space because basic astronomical facts are inconsistent with any such notion.⁶

With regard to outer space and customary international law, both Mr. Jenks, in a general way, and Professor Cooper, more specifically, have expressed the thought that the principle of the freedom of the seas appears to be the most relevant analogy. Accepting this, it would appear that entry of satellites into, and orbiting in, regions of outer space beyond the effective control of any state would not infringe upon any existing principle of customary international law and would positively be permitted under the principle most closely analogous.

Although the projection of satellites into outer space does not appear to create any real legal difficulties if launching sites are properly located, the new development regarding the return of the satellites into traditional airspace raises some problems which had not been thought to be of immediate concern. No detailed enumeration of the possible legal difficulties is necessary at this point. For a recoverable satellite it suffices to mention • that there is, of course, the possibility of unauthorized entry into traditional airspace of underlying states as well as of damage, and apprehension of damage, to structures on the earth.⁷

Whatever the degree of threat descending satellites may actually pose, it would seem to be reasonably apparent that the state upon whose territory an object was about to fall would be authorized to take whatever measures thought necessary to protect itself from injury. This presumably would include destruction of a satellite at whatever height this might be possible. It would seem difficult to proscribe such action since, at the present stage of technology, the state could not know whether or not the descending object was harmless, and even normal prudence might suggest that the worst be assumed. The most obvious support for the action taken by the underlying state is in the doctrine of self-defense. It would seem equally clear that the non-consenting, underlying state would have ample grounds for protest against a violation of its territorial airspace. Further, in the

⁶ Jenks (note 5 *supra*) 103-104.

⁷ See Art. 8 of the International Civil Aviation Convention, regarding pilotless aircraft, and the Rome Convention of 1952 on Aircraft Damage to Persons and Property on the Surface. Some manifestation of the type of difficulty which may arise in the future occurred during the writing of this editorial when a guided missile, the Snark, launched by the U. S. Air Force in Florida, failed to respond to its electronic control and presumably crashed in the jungle in Brazil. This type of missile does not rise into outer space. The Snark resembles an un-manned "air-breathing" aircraft. See New York Times, Dec. 8, 1956, p. 1, col. 1. In a later report it was stated that the "runaway guided missile" created a "sensation" in Brazil. It was indicated that the episode might have effects on negotiations between the two countries. New York Times, Dec. 9, 1956, p. 18, col. 1.

of surface damage the underlying state would have recourse to the general legal principles designed to secure protection against a claim of accidental injury by other states.

In this posture of probable developments and legal prescriptions, it might be appropriate for specialists in this area to devote some exploratory thought to measures which might be taken to allay fears that peaceful satellites might become harmful objects. An alternative which might be considered would be for each state about to launch such a satellite to register its intent to do so with an international agency, to file a description of such agency, and to file a description of the satellite's load, weight, size, etc. It would of course be impractical and not necessary to require a proposal to include details of the launching mechanism, but complete information about the load could be registered and this could be done with respect to both recoverable and non-recoverable satellites. Beyond registration it might even be desirable as a guarantee of good faith to suggest inspection by the international agency to assure that the load conforms to the description filed. A procedure of inspection need not of course include submission to prior approval.

It is suggested that the proposal so briefly indicated here is one which any country planning to launch a satellite might appropriately take under consideration.⁸ In determining whether to advance or to adhere to such a proposal, a country might of course reasonably take into account the willingness of other countries launching satellites to adopt the recommended measures of registration and inspection.

MYRES S. McDORR

THE CHANGING LAW OF NATIONS

I

It has often been stated¹ that international law, although primitive in structure and contents, has shown a remarkable stability as compared with more advanced municipal legal orders. From its beginnings of

such measures might allay apprehension of harm in a manner comparable to that of the "open skies" proposal. See Note, "The Aerial Inspection Plan and State Sovereignty," 24 Geo. Wash. L. Rev. 565 (1956).

Proposals have been made to ban testing of the intercontinental ballistic missile of Senator Flanders in Hearings, Subcommittee on Disarmament, Committee on Foreign Relations, 84th Cong., 2d Sess., p. 81 (March 7, 1956); Leghorn, "The Nuclear Threat in the Second Atomic Decade," 12 Bulletin of the American Nuclear Society 195 (1956); Inglis, "National Security with the Arms Race Limited," Washington Post, Dec. 10, 1956, stated that "administration officials" had approved a new international agreement which proposes that the use of long-range guided missiles be prohibited.

Suggestions with respect to international control of satellites during the last few years, see Leghorn, *loc. cit.* 195, and Romulo, "Alpha Centauri," 39 Saturday Review 26, 31 (Dec. 8, 1956).

See also, "Die Wandlungen des Völkerrechts," 52 Die Friedens-Vierteljahrshefte 9.

1914 it presents a clear continuity of development; no revolution as to its basic structure occurred. It remained based upon the same sociological foundations—the international community of sovereign states—and upon the same axiological foundation—the values of the Greek-Christian Occidental culture.)

(True, international law during the nineteenth century saw an important, progressive development, including the beginnings of international organization. But the framework within which this progress developed remained essentially the same. The “classic” international law was, despite its worldwide expansion, a law based on Occidental values, it was the law of a world in which Europe dominated Asia and Africa; it was the law of a pluralism of sovereign states, including a number of “Great Powers.” But these states showed a more or less ideological conformity, as being mostly national states based on the values of the liberal, constitutional, democratic “*Rechtsstaat*.” Hence, the problem of keeping the peace was predominantly the problem of balance of power.)

(But in these last decades international law has been in a period of flux, restlessness and profound change; recent developments are often full of contradictions. 1914 is the turning-point—a turning-point, but, as Max Huber points out, not a break. For, despite all changes, it has not been possible to “ban the spirit of sovereignty.” Notwithstanding all new tendencies and changes, international law, even today, is still basically the law of a community of sovereign states.)

It would, of course, be a mistake, to identify change with progress, as some are inclined to do. (Change can mean progress, but can also mean retrogression.) Newer developments have sometimes been strongly retrogressive. There is, further, the obvious ineffectiveness of some new rules and institutions such as the norms restricting or forbidding the use of force, the norms concerning collective security or international sanctions. Newer developments sometimes show a merely experimental character and are even ephemeral, such as mandates, international protection of minorities, the League of Nations. (Hence, the changing law of nations is characterized by the uncertainty, insecurity, provisional nature of many rules or even of whole departments of that law.) This present status makes any prophecy of the future of international law hazardous. Such future may lie between the extremes of an ethically higher and more effective law of one world and the possibility of a rapid fall of the whole law of nations, a return to ages of anarchy and barbarism; in the light of the terrible effect of modern weapons, even the vision of an end of civilization, of a possible suicide of humanity, cannot be wholly excluded. (Only one thing is certain: a return to the shores of 1914 is impossible.)

(It is only natural that this changing and unsettled status of international law should have exercised a profound influence not only on the minds of laymen, but also on the science of international law, that it should have led to often contradictory attitudes and bitter polemics between adherents of opposed opinions.) That is why we see even among professional international lawyers such opposite attitudes as, on the one hand, the strong con-

... passionately opposing any change in the "classic" law, or ...
 ... throwing that law away as "sterile," "insignificant,"
 "above illusion," and proudly concentrating on the study of "national policy
 considerations"; and on the other hand, the "wishful thinkers," confusing
 their dreams with reality, and the utopian preachers of the world to be

It is this unsettled and dynamic status of international law when these
 ... methods are concerned, has led to an attack against analytical jurisprudence
 ... from two opposite sides: the adherents of "natural law," confusing
 ... law with ethics, and the pure sociologists, confusing
 ... fact, or, as in the case of the so-called "policy science," confusing
 ... politics, confusing the law with the procedure of its making.

It is clear that the correct approach as to the attitude taken and the
 ... methods applied lies in the middle: sociological and axiological considerations
 ... are indispensable for a full understanding of the law: but it is,
 ... course, equally indispensable to recognize the essentially normative character
 ... of law.²

II

This changing and insecure status of international law seems to stem from
 ... two different sets of phenomena which this writer has called the "crisis"
 ... and the "transformations" of the law of nations.³ The "crisis" of the law
 ... are the changes resulting from the change of general conditions, even
 ... there were no crisis, although this change of general conditions contains
 ... also elements of the crisis. On top of these transformations there is
 ... crisis which has its roots in earlier developments, but has become
 ... since the end of the second World War. (The change in the character of the
 ... crisis is, therefore, not along one line, or in one direction, but in
 ... in contradictory directions.)

There is a transition from the law of a plurality of "Great Powers" to
 ... of a bi-polar world. There is the change from a law of
 ... of states with a certain ideological conformity to the law
 ... of states which are basically hostile to each other and with incompatible ideologies.
 ... the problem of peace is no longer so much a problem of balance of power
 ... but a problem of what is now called "peaceful co-existence."

There is, further, a transition from the law of an international system
 ... of a primarily Occidental character to the law of a community
 ... of the very different legal and value systems of the non-Occidental

... finally, the transition from the "classic" to the "new" international
 ... from the law of a loose, unorganized society of sovereign states

... the approach of Charles De Visscher, *Théories et Réalités du Droit International*
 ... (Paris, 1953).

... the author's lectures in French, "La Crise et les Transformations du Droit International"
 ... to be published in the *Recueil des Cours* of the Hague Academy of International

² ... editorial, "Pluralism of Legal and Value Systems and International Law,"
 ... 370-376 (1955).

to a more organized, more centralized law; the transition from the traditional international law, limited in contents, dealing exclusively with the relations between sovereign states, to what Dr. Jenks⁵ conceives as "an international law, expanded in scope, an international law representing the common law of mankind in an early stage of its development."

III

The changing character of international law is, first, a consequence of a transformation of general conditions, a transformation the impact of which is equally felt in the municipal legal orders. The "classic" international law presupposed the doctrines of democracy, capitalism, economic liberalism, "laissez faire," the principles of the sanctity of private property, the strict distinction between private enterprise and economic activities by states, the strict distinction between armed forces and the civilian population. All that has fundamentally changed. (The coming of total war, of ever expanding economic activities by states, the control by states of the economic life of the nation even in times of peace, and more so in times of war, the appearance of totalitarian regimes, have profoundly influenced old and well-established rules of international law and brought about far-reaching uncertainty.) These transformations, while particularly prominent in totalitarian states, are nevertheless more or less universal, to be seen also in the democracies of the free world. (They have shaken the basis of many rules of the laws of war and of the law of neutrality.) They have changed and made insecure the rules concerning immunity from jurisdiction of states in their economic activities, of state instrumentalities, of government-owned merchant vessels, government corporations; also with regard to rules concerning state responsibility (political parties, subversive and terrorist activities, hostile propaganda), and finally with regard to rules concerning nationalization, expropriation, confiscation.⁶

There are tendencies to weaken or to question old and well-established rules of international law: there is a tendency against conquest as a title of acquisition of sovereignty; there is uncertainty as to the so-called "doctrine of contiguity"; there is much confusion as to the recognition of states and governments; there are very doubtful areas as far as the law of international treaties is concerned; a weakening of the requirement of effectivity where sovereignty is acquired by occupation of a *terra nullius*; there is a complete lack of agreement as to the acquisition of sovereignty in the Arctic and in the Antarctic.

Technological developments have led to uncertainties in the laws of war, such as aerial war, chemical and bacteriological warfare, magnetic mines and so on; or have led to completely new norms in fields which before had not been of practical importance. (The coming of aviation has led in a short

⁵ C. W. Jenks, "The Scope of International Law," 31 British Year Book of International Law (1954) 1-48 (London, 1956).

⁶ These transformations are dealt with in the article of W. Friedmann, "Some Aspects of Social Organization on International Law," 50 A.J.I.L. 474-514 (1956).

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The new law norm of general customary international law according to which the legal status of the air-space is the same as the status of the land and sea. We are at the threshold of a completely new international law. The new interest in making use of the water of streams for purposes of irrigation, hydro-electric power and so on, is transforming the law of international rivers, hitherto dominated by the interests of navigation.

Other changes stem from technological (geological and engineering) progress combined with economic considerations, neo-Malthusian fears of population and an upsurge of sovereignty; the new norms for the continental shelf, the disquieting developments with regard to the limits of territorial waters, contiguous zones, the law of high seas, developments which, in extreme cases, threaten the survival of the fundamental principle *juris cogentis* of the freedom of the high seas.

There is, further, the advent and enormous expansion of international organizations, quasi-universal and regional, general and specialized. They have brought many new developments: international organizations as subjects of international law, in the field of international treaties, privileges and immunities, responsibility, capacity to claim indemnities. There is no doubt that the scope of international law, formerly restricted to relations between sovereign states, has expanded: stateless persons, refugees, enormous populations of trusteeship territories, solution of economic, financial, social, health, cultural, educational problems on a worldwide scale, development of, and technical aid and assistance to, underdeveloped countries. There is no doubt that the law of international organizations, although based on particular international law, has also deeply influenced general international law.

The new quasi-universal general international organizations have not confined themselves to international co-operation in the so-called non-political fields. They have attempted to regulate activities which the states have regarded as their exclusive domain. Hence new international experiments have appeared which would have been unthinkable before. Of these the attempt to restrict or even abolish the use of force in international relations, the idea of "international concern," as expressed in Article 18 of the League of Nations Covenant, the ideas of collective security, international sanctions, the attempts at an international criminal law, the international protection of human rights. True, many of these attempts have proved to be ineffective and have made whole departments of international law.

1. A legal question has been asked: Who owns the universe? Cf. C. V. Dondos, "The Law and Activities in Space," 5 Int. and Comp. L. Q. 9-11 (1956).
2. American Society of International Law, 1956, pp. 84-115. See also the principles of a new international law applicable to the motion of the International Astronautical Congress, held recently at Rome (New York Times, 1956, p. 12).
3. Cf. J. Lador-Lederer, "Vom Wasserweg zur internationalen Schifffahrt," 1956, Zeitschrift für Völkerrecht 225-241 (1956).
4. Cf. Lador-Lederer's editorial, "General International Law and the Law of International Organizations," 1953, A.J.I.L. 456-460 (1953).

law, like the laws of war and the law of neutrality, extremely insecure. These attempts have led scholars to question the whole philosophy on which the current concept of international organization is based.¹⁰ Scholars have insisted that it is impossible to make revolutionary changes without changing the sociological foundations on which present-day international law is based.) Charles De Visser has written that any advance in this direction must start with a change in the distribution of power which, at this time, is in the hands of the sovereign states. Yet, on the other hand, it is unlikely that these new ideas, inspired by a deep concern with the consequences of modern war, will, despite their ineffectiveness so far, disappear completely.

IV

On top of all these elements of transformation there is an actual crisis, the elements of which can be only briefly enumerated here. There is, first, the decline of Europe, which prior to 1914 was the hub of international affairs, the creator of our Occidental culture and of our international law based on the values of that culture. The center of gravity of Occidental culture has definitively shifted from Europe to the United States of America.

There is, second, the emergence of the Soviet Union as the other of the only two Great Powers, a phenomenon which by itself has completely changed the power structure of the world. There is, third, the split between two antagonistic worlds, each led by one of the two Great Powers, the deep ideological abyss, the cold war. It is obvious that this split has the most far-reaching influence on general international law and the law and functions of international organizations.

There is, fourth, the "anti-colonial rebellion." The upsurge of Asia and Africa is a challenge, not only to Europe, but to the whole Occidental world of the white man.

There is, fifth, the coming of the atomic age, a technological development to which a special place must be assigned, for in the last analysis it places humanity before the dilemma of a true peace or annihilation.

But all the transformations, all the elements hitherto mentioned, of the crisis do not yet fully explain the present crisis of the law of nations. For this is only a partial phenomenon of the total crisis of our whole Occidental culture. This crisis produces many technical, including legal, problems; but, as every authentic and genuine crisis, it has its deepest and veritable roots in philosophy, ethics, and religion. It is the crisis of the ideals and values of our Occidental culture which has produced in all realms of human life the uncertainty, insecurity, provisional nature, so characteristic of this epoch since 1914.) Modern man has lost faith, has lost his connection with God. He has during the last centuries put all the emphasis on natural sciences and technology—and has done so with astonishing success. But the truly fundamental problems, which are not the technological problems dealing only with means, but those dealing with the ends,

¹⁰ See W. Schiffer, *The Legal Community of Mankind* (New York, 1954).

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Man has neglected or ignored. Man has confused technological progress with moral progress. The present crisis clearly shows that these fundamental ideas cannot be ignored with impunity. That is why man today is so ill-prepared for his own scientific conquests, which tend to become a perilous danger rather than a benefit. Modern life has strongly contributed to bring about and to deepen this spiritual crisis; the de-personalization of man through the machine, the struggle, haste, and overwork of modern life, the lack of time, energy and the will to perfect oneself. There has been the emergence of the masses, dominating modern life, the progress of the intellectual elites; hence the decline of great literature, art and music; the monotony of modern "entertainment" by standardized radio, media, productions which so often bring out the contrast between the technologically wonderful means and the inartistic, valueless contents. Hence the indifference to everything which is not "practical" in terms of money and power, the lack of interest in the higher things; hence also the declining respect for the rule of law, the "politicization" of everything, the unwillingness of men to think, the mass indoctrination, the preference given to security over freedom, the superficiality and spiritual emptiness of the life of the majority of mankind; as the President of Georgetown University formulated it a few years ago in a speech: (The majority of men in the so-called backward countries have nothing to live on and the majority of men in the so-called advanced countries have nothing to live for. A true civilization is not a technological but an ethical phenomenon; where the ethical basis disappears, a civilization is bound to disappear. Who can look without the deepest concern at the horrible persecutions and tortures, at the increasing inhumanity of men toward men, as shown by total war, at the prevalence of purely materialistic doctrines which necessarily imply nihilistic consequences? That is why a truly great man, Dr. Albert Schweitzer, in his speech on the occasion of receiving the Nobel Peace Prize, could speak of "horror and inhumanity of our present existence.")

To overcome the crisis and to preserve our Occidental culture more than technical means, however important and indispensable they are. Thus also for a truly progressive international law, what is needed in the deepest sense, is a spiritual, ethical regeneration: For man does not breed alone.

JOSEF L. KUNZ

THE MEETING OF PRESIDENTS AT PANAMA

On Jan. 22, 1826, a Congress of American States met in Panama on an invitation from Simon Bolívar, "The Liberator," then President of Venezuela. Not all of the American states were represented, Argentina and Brazil being conspicuous among those absent. The United States was not included in Bolívar's invitation of 1824; but President Adams was willing to accept as official an invitation from the acting President of Colombia, Santander. Unfortunately, neither of the appointed delegates from the United States was present at the meeting. The four governments named at the Congress signed a Treaty of Perpetual Union, but this

of them failed to ratify the treaty and Colombia only did so in part. The meeting that was to have been held at Tacubaya, Mexico, to exchange ratifications found only the United States delegate present.

What, then, was there to celebrate a hundred and thirty years later? How did the Congress of Panama come to attain such a position of importance in the history of inter-American relations as to justify a meeting of the Presidents of American states in commemoration of it? The answer lies in the part played by the Congress of Panama throughout the nineteenth century in keeping before the minds of statesmen the ideal of continental unity in spite of dissension and conflict, which at times seemed to justify the reaction of Bolívar in the years succeeding the Congress, "that he had plowed the sea." Doubtless if continental unity had made no greater progress than that represented by the International Conferences of American States that met from 1889-1928, there would, indeed, have been little to celebrate. The Conference at Havana in 1928 ended on a note of disillusionment. As long as the United States chose to enforce its unilateral conception of the application of the Monroe Doctrine under guise of an international policemen'ship, continental solidarity had no more than an oratorical appeal. But with the adoption at the Conference of 1936 of the principle of consultation in the event of a threat to the peace, and with the declaration of 1940 that an attack upon one was to be considered as an attack upon all, the sentiment of unity took a firm hold upon the American states—a hold strengthened by the determination five years later to preserve their new system against absorption by the United Nations. Then, in 1947, came the formal adoption of the regional security system, and a year later the reorganization of the Union of 1890 to make it a more effective agency of inter-American co-operation.

The Organization of American States had now gone far beyond even the vision of Bolívar. It was not in legal structure the close alliance contemplated by Bolívar, but it was far more comprehensive in scope. It was not a union created primarily for defensive purposes, it was not a mere system of collective security, but an organization looking to the promotion of economic and social objectives that had now come to be regarded as the fundamental conditions of a stable political order. When, therefore, it came to be realized that a new era had opened up before the American states, it was but natural that the Congress of Panama of 1826 should in a sense shine in reflected light and be commemorated not so much for what it had been at the time as for what its lineal successor had come to be in the course of the years, without examining too closely the structural likeness between the two. After all it was hardly to be expected that the original design of the building should have been followed by the architects of a much later day.

The first plan of commemorating the Congress of 1826 was that the ambassador-representatives of the Organization of American States should meet in Panama; then came the suggestion of having President Eisenhower meet there with them; then the decision to invite the presidents of all the American states to meet in an extraordinary session. In pursuance

of this plan the Ambassadors met from July 18 to 22, 1956. On July 21, fifteen of the twenty-one presidents met and, after the usual formal ceremonies, signed on July 22 a formal statement of principles and purposes bearing the title, "Declaration of Panama" (annexed hereto). The preamble of the Declaration refers to the Assembly of Plenipotentiaries of the American States of 1826 as constituting "the first collective manifestation of Pan Americanism" and recognizes "the continuing validity of the ideas which inspired the precursors of continental solidarity." Five successive paragraphs proclaim in turn the destiny of America to give tangible meaning to the concept of human liberty; the belief that the realization of the destiny of America calls for the economic and social development of its peoples and for co-operative efforts to raise the standards of living; the fact that the security of the Continent that has been obtained by the Organization of American States gives assurance of what loyal co-operation can accomplish; the threat to American ideals from totalitarian forces; and the contribution which a united America may make towards achieving for the whole world the benefits of a peace based upon justice and freedom.

It is significant that the Declaration of Panama recognized the key position held in inter-American relations by the collective security system established by the Treaty of Reciprocal Assistance signed at Rio de Janeiro in 1947 and incorporated the following year in the Charter of the Organization of American States adopted at Bogotá. Now that the danger of war has been removed by transferring to the whole regional community the obligation to protect its members against acts of aggression, the American States are free to devote their national resources to raising standards of living and securing for their peoples the benefits of economic and social welfare. If an exception must be made of the United States, it is for reasons outside of intra-hemispheric security.

In his address on July 22 to the meeting of presidents and ambassadors President Eisenhower looked forward to "a new phase of association" based upon the principle that the material welfare and progress of each member was vital to the well-being of every other; and he proposed that an advisory group of Presidential representatives should meet and make specific recommendations for action. Following up the suggestion of President Eisenhower, on August 3 the Government of the United States made public a note urging the Latin American governments to appoint their plenipotentiaries to the committee and suggesting Washington as the meeting place. The note underlined the aims of the meeting as being

to prepare concrete recommendations for making the Organization of American States a more effective instrument of cooperative effort in the economic, financial, social, and technical fields.

On September 17 the Inter-American Committee of Presidential Representatives met at the Department of State in Washington to give effect to the proposal of President Eisenhower. The objective of the meeting, which was a preliminary one, was to identify the problems for the solution of which recommendations would subsequently be drafted and submitted to

the presidents of the American states. In the course of the discussions there was a general recognition of the need of strengthening the Organization of American States, with emphasis upon the practical steps the Organization might take to promote the economic and social welfare of the peoples of the American continents, looking to the long-range program of raising living standards. An elaborate body of proposals was adopted under the successive heads of economic, social, financial, technical, administrative and organizational, and atomic energy. In each of these fields emphasis was placed upon the contribution that might be made by programs of technical assistance training, and educational work.

The committee adjourned after three days of intensive work, with the understanding that the studies to be undertaken would be reviewed at a meeting in the late winter, to be followed by a final meeting in the spring at which a definitive and selected number of resolutions would be drafted for submission to the twenty-one American presidents.

It is no criticism of its value to say that the Inter-American Committee of Presidential Representatives does not fit in with the existing machinery of the Organization of American States. The Charter describes the organs of the Organization, making the periodic conference the "supreme organ," which has to decide the general action and policy of the Organization. But if the presidents of the states members of the Organization chose to intervene and recognize that the Organization is capable of performing a far more effective service to their countries than that actually being performed in the routine administration of the Organization under the direction of their respective foreign offices, who could be found to object—least of all the foreign offices themselves, which may have long sought to expand the activities of the Organization but have been restrained by lack of financial support from their respective legislatures?

As for the elaborate draft of specific problems selected by the committee for study during the interim period of four or five months, scarcely an item appears on the draft that has not long been part of the technical work of the several departments and divisions of the Pan American Union. The topics falling under the head of "economic matters": agriculture, industry, trade, transportation, and those falling under the head of "social": public health, education, housing, social welfare, fit into the existing organization of the Department of Economic and Social Affairs of the Pan American Union; and in like manner the topics included under "financial" and "technical" are part of the special fields of study of the Department. A single exception in respect to new problems to be studied is in the assignment to the Department of International Law of the Pan American Union of the task of drafting model atomic energy legislation as a means of assisting Latin American countries in establishing atomic energy programs.

But even if the Committee of Presidential Representatives should, in the course of the studies undertaken by it, do no more than discover the scope of the work already under way at the Pan American Union, it will nevertheless be able to contribute effectively to the promotion of the chief objective of the meeting of the presidents at Panama. There is no ground

for resentment on the part of the Organization of American States that the presidents have sought, as it were from the outside, to give an impulse to activities which their own foreign offices were already in a position to promote, had they believed themselves justified in doing so, and had they been able to draw upon the necessary financial resources. The field of work is wide and open; and the several organs of the Organization of American States, the Conference, the Meeting of Consultation, the Council and the Pan American Union, each and all intent upon the objectives set forth in the program of the 'Presidents' Committee will welcome whatever contribution the committee can make to the important tasks before them. The important thing is to push ahead with an objective already clearly outlined at the Conference of Caracas and only needing the practical application of principles to the concrete conditions before us.

C. G. FENWICK

ANNEX

DECLARATION OF THE PRESIDENTS OF THE AMERICAN REPUBLICS IN PANAMA

WE, THE PRESIDENTS OF THE AMERICAN REPUBLICS

Commemorating in the historic City of Panama the Assembly of Plenipotentiaries of the American States of 1826, convoked by the Liberator Simon Bolívar, which constituted the first collective manifestation of Pan Americanism; and recognizing the continuing validity of the ideals which inspired the precursors of continental solidarity, subscribe to the following Declaration:

1. The destiny of America is to create a civilization that will give tangible meaning to the concept of human liberty, to the principle that the State is the servant of man and not his master, to the faith that man will reach ever greater heights in his spiritual and material development and to the proposition that all nations can live together in peace and dignity.

2. The full realization of the destiny of America is inseparable from the economic and social development of its peoples and therefore makes necessary the intensification of national and inter-American cooperative efforts to seek the solution of economic problems and to raise the standards of living of the Continent.

3. The accomplishments of the Organization of American States, an assurance of peace among the Member States and of security for the Continent, demonstrate how much can be achieved in the various fields of international endeavor through a loyal cooperation among sovereign nations, and move us to strengthen the inter-American organizations and their activities.

4. In a world in which the dignity of the individual, his fundamental rights and the spiritual values of mankind are seriously threatened by totalitarian forces, alien to the tradition of our peoples and their institu-

tions, America holds steadfastly to its historic mission: to be a bulwark of human liberty and national independence.

5. An America united, strong and benevolent will not only promote the well-being of the Continent but contribute toward achieving for the whole world the benefits of a peace based on justice and freedom, in which all peoples, without distinction as to race or creed, can work with dignity and with confidence in the future.

Signed in the City of Panama this twenty-second day of July, nineteen hundred and fifty-six.

NOTES AND COMMENTS

INTERNATIONAL LAW ASSOCIATION MEETING AT DUBROVNIK

The Forty-Seventh biennial Conference of the International Law Association met at Dubrovnik in Yugoslavia August 26 to September 2, 1956. To Americans, the point which is perhaps of most interest from this conference was its decision to meet at the New York University Law Center in 1958, the first time since 1930 that the Association has had a meeting in this country.

Dubrovnik, on the sunny coast of the Adriatic, was a delightful location and the Yugoslav hosts entertained their guests in bountiful fashion. Milan Bartos, head of the Yugoslav Branch, was elected President of the Association, and began the discussions with a talk upon the "Juridical Aspects of Active Peaceful Coexistence between States." The following day was devoted to "Review of the United Nations Charter," and amendments to the report of the committee on that subject (George Schwarzenberger, Chairman) were submitted by Louis Sohn, Chairman of the American Branch committee on the subject.

Of these, the following of the proposals of the American Branch were adopted:

I. The desirability of the following amendments to the Charter of the United Nations and the Statute of the International Court of Justice should be considered by the United Nations:

(a) Article 34 of the Statute of the International Court of Justice should be amended to give to the United Nations and its specialized agencies direct access to the Court in contentious cases;

(b) Article 96 of the Charter should be amended to empower the General Assembly to authorize other public international organizations, whether general or regional, to request advisory opinions of the Court;

(c) Article 35 of the Statute should be amended to empower the General Assembly to establish the conditions under which the Court would be open to public international organizations other than the specialized agencies;

Article 36 of the Statute should be amended to empower the General Assembly to establish the conditions under which the United Nations, its specialized agencies and other public international organizations might make declarations accepting the jurisdiction of the Court under paragraph 2 of that Article.

II. Article 96 of the Charter should be amended so as to impose upon the organs of the United Nations the obligation to request from the International Court of Justice an advisory opinion concerning any situation in which the claim is made by a Member that the organ had exceeded its jurisdiction under the Charter.

The Committee was instructed to study another of the proposed amendments

Granting to the General Assembly the power to adopt rules of International Law which would become binding upon each Member which does not, within a specified time, notify the United Nations of its rejection of the rules.

The report of the Committee on the Uses of the Waters of International Rivers (the chairman of which was the writer of this note) aroused warm debate. Members from India and Israel moved adjournment of consideration of the subject, but later withdrew their opposition and, at a second session, a resolution was unanimously adopted. The following statement of principles was adopted "as a sound basis upon which to study further the development of rules of International Law with respect to international rivers" and the committee was instructed to formulate rules of international law for the next conference:

- I. An international river is one which flows through or between the territories of two or more states.
- II. A state must exercise its rights over the waters of an international river within its jurisdiction in accordance with the principles stated below.
- III. While each state has sovereign control over the international rivers within its own boundaries, the state must exercise this control with due consideration for its effects upon other riparian states.
- IV. A state is responsible, under international law, for public or private acts producing change in the existing regime of a river to the injury of another state, which it could have prevented by reasonable diligence.
- V. In accordance with the general principle stated in No. III above, the states upon an international river should in reaching agreements, and states or tribunals in settling disputes, weigh the benefit to one state against the injury done to another through a particular use of the water. For this purpose, the following factors, among others, should be taken into consideration:
 - (a) The right of each to a reasonable use of the water;
 - (b) The extent of the dependence of each state upon the waters of that river;
 - (c) The comparative social and economic gains accruing to each and to the entire river community;
 - (d) Pre-existent agreements among the states concerned;
 - (e) Pre-existent appropriation of water by one state.
- VI. A state which proposes new works (construction, diversion, etc.) or change of previously existing use of water, which might affect utilization of the water by another state, must first consult with the other state. In case agreement is not reached through such consultation, the states concerned should seek the advice of a technical commission; and, if this does not lead to agreement, resort should be had to arbitration.
- VII. Preventable pollution of water in one state, which does substantial injury to another state, renders the former state responsible for the damage done.
- VIII. So far as possible, riparian states should join with each other to make full utilization of the waters of a river, both from the viewpoint of the river basin as an integrated whole, and from the viewpoint of the widest variety of uses of the water, so as to assure the greatest benefit to all.

Increased interest in this subject was shown in instructions to the Association to broaden its membership to include all Branches, and to broaden its terms of reference to include navigation and artificial waterways.

The Committee on Insolvency was asked to continue its work, and the British committee was asked to reconsider its draft to meet objections raised to it. The International Company Law Committee was asked to "study the question of the transfer of the place of central control, as municipal laws differ greatly on the question whether a company may remove its seat abroad and change its personal law without having to submit to a new incorporation"; and to draft a convention concerning all questions considered at Dubrovnik. The Committee on Family Relations, subjected to an unexpected attack, was asked to consider further the draft convention which had been criticized at Dubrovnik. A resolution was adopted on the initiative of the Yugoslav Branch, asking for study of international medical law especially in connection with the Geneva Conventions.

The Association approved the report of the Air Law Committee (of which Arnold Knauth was made *rapporteur*) which, among other things, recommended that states which have not signed the International Air Services Transit Agreement should do so; that, as regards landing rights, "States let themselves be guided by the basic principle that the social and economic needs of the individual are served by having at his disposal the most extensive international air communications possible"; and that the committee

continue the study of the nature and contents of air sovereignty, paying special attention to the problems connected with coming flight in the outer space and the legal nature of inter-planetary space.

The resolution concerning International Monetary Law (Professor Guttmann, Chairman), had not been received at the time of this writing.

Sixty-seven Americans were listed as registered to attend the Conference though not all of them appeared; some were called away to participate in important international legal controversies. The host country had invited representatives from various Communist countries, and they were permitted to attend as guests and to speak when invited by the chairman. Among the persons from the Soviet Union was Judge Krylov, who spoke on formal occasions. Few of these guests spoke except concerning co-existence, and in opposition to review of the Charter of the United Nations. Poland was readmitted as a Branch; it seems probable that other Communist states will have organized branches by the time of the next conference.

The New York University Law Center had offered facilities for meetings, lodgings for a hundred foreign guests, and a guarantee of the expenses of the working conference up to a certain amount. This offer was well received, in spite of uncertainties expressed concerning the cost of the trip, and, at the suggestion of M. Bartos, the invitation was accepted by acclamation in the Full Council. It is hoped that American international lawyers will keep in mind this rare visit of the Association to this country and will reserve a week around the first of September, 1958, to attend its sessions.

CLYDE EAGLETON

CONFERENCE ON THE TEACHING OF INTERNATIONAL LAW

A Conference on the Teaching of International Law was convened by the Carnegie Endowment for International Peace at its European Center in Geneva, August 13-15, 1956. Professor Charles De Visscher presided and Professor Paul De Visscher acted as *Rapporteur*. The other participants were Madame Bastid and C. Rousseau, Professors of the Law Faculty, University of Paris; Professor François, Rotterdam; Professor Guggenheim, Geneva; Mr. Jenks, International Labor Organization; Professor Schwarzenberger, London; Professor Waldoek, Oxford; Professor Wehberg, Geneva; and the undersigned, Columbia University.

On the suggestion of the Chairman, the Conference concentrated its attention upon the general orientation and methods of teaching international law, deliberately excluding consideration of programs and subject-matter. The composition of the Conference made possible a most instructive comparison of the differing problems of instruction in different countries and of differing methods used to meet these problems. In spite of the diversity of conditions and traditions, a gratifying unanimity on basic approaches emerged from the discussion.

There was full agreement about the general trend of the teaching of international law. As summarized by the *Rapporteur*:

After the dogmatic approach of the advocates of legal formalism, who described international society according to a pattern they had themselves elaborated from a purely deductive system of norms, and after the reaction following the second World War of those authors who considered international law as merely the hypocritical veneer of a purely anachronistic social state, the time now seems to have come when the internationalists are ready to associate themselves with a more moderate and more scientific approach which will bring them to judge objectively and with an open mind the respective roles played by social realities and by law in the various phases of international life. This strictly scientific frame of reference will compel the student of international law to devote time to a careful study of the multiple political, economic, and psychological facts which he formerly believed possible to by-pass, but whose influence must today be recognized as basic to the formation, the interpretation, or the disappearance of the norm of law. To express their common view on this point, the participants adopted their first conclusion, stating that the teaching of international law must necessarily, under whatever form it may be presented, "give adequate consideration to the analysis of the social realities underlying the norms of positive law."

It was made clear that in Europe as well as in Great Britain and the United States, "the profession has given up the method of exegesis and other strictly formal methods which were characteristic of teaching towards the end of the nineteenth century." At the same time, it was agreed that it is necessary to avoid "the distortion of law by confusing it with sociology or political science." In general, the philosophy expressed by Professor Charles De Visscher in his notable book, *Théories et Réalités en Droit International Public*, found ready acceptance.

In considering teaching methods, the Conference noted the distinction

between courses designed for the large majority of students who include international law as one course in some general program of study, and the relatively small number who specialize in the subject. There was considerable support for the view that it was useful in the general courses to have a student group which includes both law students and students specializing in political science or economics. It was the general view that international law courses may most advantageously be offered to students already well advanced in their university curriculum:

Experience tends to prove that when a course in international law is given to first-year students, the subject matter runs the risk of being either (1) completely above the student's comprehension or (2) considered as a course in current events, and accordingly relegated to a secondary position.

On the other hand, if the course in international law is deferred to the very last year, there is no opportunity for the student to develop through further specialized work an awakened interest in the subject.

As was to be expected, the conferees reflected widely different points of view about methods of instruction. The European members showed a sympathetic interest in the "case method" of instruction, but pointed out that in general it was not well suited to the general courses given in European universities where the lecture system predominates. It was generally agreed, however, that in seminars and other advanced specialized courses, student participation, which has not traditionally characterized European university instruction, is very desirable.

It was fully appreciated that course offerings in international law would vary with the resources of each university. Where one general international law course is offered, the Conference suggested:

The basic teaching of international law should in no way aspire to provide the students with an extensive scientific knowledge of all the phases of international law or of all the aspects (historical, political, economic) of law and legal institutions. It is of the utmost importance that this teaching, at the same time that it provides the students with a certain minimum of basic knowledge, succeed in giving them a more realistic way of thinking. . . . The art of the teacher will lie in his ability to combine the amount of legal and extra-legal material offered in his courses in such a way as to preserve the coherence and the original characteristic of law.

The members of the Conference shared the view which is widely held in the United States, that seminars for graduate students should be so conducted as to sustain the lively interest of all the students. In the words of the *Rapporteur*:

This basic element is rarely present when the students take turns presenting their various research projects to the assembled seminar. The seminar, in such cases, becomes too often a private interview between research student and professor. It would seem preferable, in order to adapt the seminar to the needs of the group as a whole, that the entire group concentrate its attention on some central issue, the different aspects of which can then be studied by every student in turn.

These collective studies, highly esteemed in the United States, often become the basis for published work, and thereby spur the students on to increased effort.

Finally, the Conference stressed the importance of the rôle of international law in general legal education. Attention to historical, economic and social backgrounds cannot be allowed to obscure the essentially legal nature of the subject and its place in the municipal legal system.

Although the participants in the Conference were few in number, it re-emphasized the value of such exchanges of view as have taken place in the several conferences of teachers of international law and related subjects which have been held from time to time in conjunction with the annual meetings of the American Society of International Law. The Geneva Conference indicated the value of including teachers whose experience reflects the differing conditions in different university and legal systems.

The text of the Conclusions of the Conference is printed in the following Annex to this note.

PHILIP C. JESSUP

ANNEX

Conclusions

The members of the Conference on the Teaching of International Law met in Geneva under the auspices of the European Centre of the Carnegie Endowment,

Having decided not to consider specific programmes or curricula but to limit their discussions to the general orientation and methods of teaching international law, the members were of the opinion

A. that in so far as the general orientation of the teaching is concerned, such academic instruction, whatever its setting, should give due attention to the social realities underlying the norms of positive law and, by so doing, give the students a sound understanding of international life which the rule of law is called upon to govern, and

B. that this can best be provided for in the basic teaching intended for the general student of law and political science by formal lectures (diplomatic history, geography, international economic relations, etc.), or by using methods of teaching involving active participation of students in the study of law (seminars, discussion groups, case method).

This fundamental teaching, based on the study of the international "milieu" should stimulate the interest of the students in the over-all development of law, economics, political science and of international organization, and encourage among some of them a wish to acquire more specialized and extensive knowledge. In view, however, of the practical difficulties encountered by universities and other institutions of higher learning in carrying out these newer methods, it was considered that the basic teaching intended for the large majority of the students could deal successfully with the concrete study of the international milieu in a gen-

eral course of a strictly scientific nature, on condition that the following points were carefully kept in mind:

- 1) that more time be given to the professor responsible for the general course of international law than is usually the case;
- 2) that this teaching, enriched by the study of fundamental aspects of international life and thereby forming one of the essential ingredients of a general legal culture, be offered to those students already well advanced in their university curriculum;
- 3) that the general course be supplemented by a seminar devoted to the discussion of concrete cases.

C. With regard to the minority of university students who wish to acquire a specialized or more complete training in international law, it was agreed by the members of the conference that such instruction be characterized by a large degree of flexibility and variety in order to meet the special needs of given situations, such as the turn of mind particular to each country, or indeed, the personality of each professor. Attention was drawn to the importance, at this level, of courses intended to stress certain particular aspects of international legal relations as well as methods intended to bring about the students' individual and active participation in scientific research.

It is during the course of seminars, research projects and study groups, of not more than 20 students and devoted either to the discussion of participants' work or to the study in common of some definite problem, that the professor will find it easiest to create an interest on the part of his students in the study of international law.

D. It was also pointed out that it is especially necessary today that the role of international law in the legal framework of society be more clearly understood. With this consideration in mind it was further believed that more attention should be given, whether on a university or professional level, to the relationship between international and municipal law, specifically as concerns the connections between constitutional and international law.

51st ANNUAL MEETING OF THE SOCIETY

The 51st Annual Meeting of the Society will be held at the Hotel Statler in Washington, D. C., from April 25 to April 27, 1957. Sessions will begin on Thursday afternoon, April 25, and conclude with the annual banquet on Saturday evening, April 27.

The topics selected for discussion, as the Society embarks upon its second half-century, relate primarily to the world conditions which pose a threat not unlike conditions prior to World Wars I and II. Reflecting the importance of having the views of the Society's members on current conditions affecting the maintenance of the rule of law in international relations, discussion of the principal papers of each session will be inaugurated by selected commentators with the remainder of the time set aside for general discussion. Because of the importance of the current international ques-

tions to be considered, President Woolsey, with the concurrence of the Society's other officers, has decided to lengthen the annual meeting by an additional half-day session to be held on Thursday afternoon.

In view of the increasing importance of international canals and rivers now subject to international differences, such as the Suez, the Columbia River in North America, the Indus River in the Indian subcontinent, as well as others, the topic for the opening session on Thursday afternoon, April 25, will be navigation and other uses of international canals and rivers.

The evening session on April 25 will be addressed by President Lester H. Woolsey and, it is hoped, by the Secretary of State, followed by general discussion of the addresses.

At the core of the three sessions on Friday, April 26, will be past and prospective developments in the operations of the United Nations, which it is believed will be of great interest to members of the Society. The legality of intervention, such as the Anglo-French operation in Suez under the United Nations Charter and the Charter of the Organization of American States, will be the topic for Friday morning.

The more effective organization of collective security, including alternatives to the veto power, will be the topic for Friday afternoon. Following that session, there will be an informal reception for the officers and members of the Society and their guests.

International law relating to atomic weapons and peaceful uses of atomic energy will be discussed by a panel of speakers on Friday evening, April 26. Individual panel members will discuss topics such as: the bilateral agreements between the United States and nearly forty other countries; the International Atomic Energy Agency; EURATOM, the proposed agency for European atomic energy co-operation; doing business abroad in atomic energy materials; H-bomb testing, waste disposal and other pollution problems; international responsibility of states for injuries resulting from atomic fission and fusion.

The session on Saturday morning, April 27, will begin with further discussion of the previous days' topics, followed by committee reports, especially the report of the Committee on Study of Legal Problems of the United Nations, election of officers and transaction of other business.

The annual meeting will conclude with a banquet on Saturday evening, April 27, in the South American Room of the Hotel Statler. A program of distinguished speakers is being arranged and it is expected that diplomatic officers of many countries will attend with their ladies.

A limited number of rooms at the Hotel Statler have been made available for reservation by members of the Society attending the annual meeting. Reservations should be made directly with the hotel.

It is expected that announcements of the annual meeting will go out to the members of the Society well in advance of the meeting. Suggestions relating to the program will be welcomed.

WILLIAM ROY VALLANCE
Chairman, Program Committee

INTER-AMERICAN ACADEMY OF COMPARATIVE AND INTERNATIONAL LAW

The Ninth Meeting of this Academy will take place at Havana, Cuba, from Monday, February 11, 1957, through Saturday, February 23rd, in the Academy of Sciences Building, 460 Cuba Street. The Academy has met annually, with a few interruptions, since 1945. Following its usual curriculum, at the forthcoming meeting there will be six monographic courses of five lectures each, delivered in the forenoons, as follows:

1. "The law of angary—its application by Chilean tribunals." By Dr. Arturo Alessandri, of the University of Chile. (In Spanish.)
2. "Governments *de facto* and the legitimacy of their acts." By Dr. Salvador Dana Montarno, of the Universidad del Littoral, Argentina. (In Spanish.)
3. "The juridical regime of the sea." By Dr. Alberto Ulloa, Director of the Diplomatic Academy of Peru. (In Spanish.)
4. "The right to resist oppression in comparative constitutional law." By Dr. Roman Infiesta, of the University of Havana. (In Spanish.)
5. "The influence of regionalism in international law." By Professor Charles E. Martin, University of Washington, Seattle, U. S. A. (In English.)
6. "The settlement of international boundary waters questions in North America." By Mr. William Roy Vallance, Assistant to the Legal Adviser, U. S. Department of State, Secretary of the Inter-American Bar Association. (In English.)

To be admitted to the Academy, applicants must meet the following requirements:

- (a) Be a graduate or senior-year student of a law school or school of political or social science or of public law of any of the Latin American countries.
- (b) Hold an LL.B. degree from a college or university of the United States or Canada. An A.B. or B.S. degree will be accepted in lieu of an LL.B., provided the applicant has majored in political or social science, public law, government, or international relations.
- (c) Equivalent academic work taken in Eastern Hemisphere universities. Best results will be achieved by students who at least understand Spanish and English.

Students may register personally in Havana before the meeting starts not later than Sunday, February 10th, or by mail from January 15 to 31, at the office of the Academy, 556 Aguiar Street, Department 43, Havana. The registration fee is \$25.00.

The Academy grants a scholarship to each of the Latin American countries and to the United States, consisting of tuition and expenses of room and board for two weeks in Havana from Sunday, February 10th to Sunday, February 24th, at the Hotel Ambos Mundos, 153 Obispo Street.

Further information regarding the meeting, passports, hotel reservations, climate, clothing, etc., may be obtained from the Academy Director, Dr.

Ernesto Dihigo, Aguiar 556, Havana, Cuba. Information regarding scholarships from the United States may be obtained from the Inter-American Bar Association, 210-211 Portland Building, 1129 Vermont Avenue, N.W., Washington 5, D. C.

GEORGE A. FINCH

*President of the Inter-American Academy
of Comparative and International Law*

THE AMERICAN INSTITUTE OF INTERNATIONAL LAW

(Translated from the original Spanish)

The American Institute of International Law, with headquarters in Washington, was for many years an active organization of high intellectual caliber and worldwide renown. The President and chief instigator of the Institute was the late Professor James Brown Scott, an international law specialist of distinction. After his death, another esteemed and well-known American internationalist, Dr. Antonio Sánchez de Bustamante, was made President. Shortly thereafter, the death of Dr. Bustamante and the enforced absence of the last Secretary General, the able Panamanian internationalist, Dr. Ricardo Alfaro, brought the activities of the Institute to a halt; and for lack of financial resources it has been unable to maintain its high reputation.

Under these circumstances, the Institute has practically ceased all activities, and this fact has worked to the detriment of the science of international law throughout the Americas, including, I am persuaded, the United States, which is universally considered to lead the Americas, if not the whole world, in matters of science and economics.

It is believed that the revitalization of the American Institute of International Law is of primary importance to the future of international law in the Americas, the region that can be considered, without exaggeration, as playing in the future the decisive rôle in international law throughout the world. The hopes of mankind in matters of international law are centered in the Americas, for it is in America that theories were originated that are now deeply rooted in the minds of experts and even in what might be called the popular consciousness of such matters. To abandon the Institute is to abandon that great mission we have a moral obligation to fulfill.

Although there are various national associations of international law, some of which are quite active—as in Mexico, Brazil, Argentina, and Peru, where we have been tenaciously publishing our journal for fifteen years—the work of these institutions is not co-ordinated, and their publications or other efforts have only a very slight international impact, something quite different, truly, from the importance of the Institute and the extent to which its achievements are known.

Because the work of the Institute and its impact on the activities of the national societies affiliated with it have been paralyzed, some of the latter have proclaimed their independence, to enable them to continue their own activities without being linked to the fate of the Institute. The Institute,

which has helped to give a more vigorous organization to certain of the societies, would give even greater diffusion and co-ordination to their studies in the future, if it were again to take up the work it had been doing in the past. At the same time, the autonomy of the national societies would have the advantage of refuting the facile criticism by tendentious groups to the effect that they would be dependent upon a United States institution.

In speaking of the slight international impact of the work of national societies, there is no thought, naturally, of the American Society of International Law and of the *American Journal of International Law*, its excellent and renowned organ, which is distributed throughout the world. Rather it is believed that the national societies and the Institute, seen from abroad, would make up a single unit or center of juridical thinking.

Hispano-Americans cannot fail to recognize that European juridical science—with some exceptions with respect to the United States and a few jurists—has often been thought superior to American juridical science, which has been considered only an extension or development of the former; that is, forming part of the great world extension of European thinking. If the Americas should not maintain and develop a continental institute of international law, with its own intellectual activity and its own idea of juridical concepts, this would be the same as confessing their inability to participate in the lofty speculations of human thought.

This is entirely convincing, and it would seem to follow that we should make an effort, as great and as extended as necessary, to revive the American Institute of International Law and once more give it the prestige that it had for almost a quarter of a century, during which the eyes of governments, universities, cultural centers, and students of international juridical science were centered on this great combination of able men and organized efforts, which found expression in the notable work accomplished by the Institute at its meetings, principally those in Washington, Havana, Rio de Janeiro, and Montevideo. All this must not be either forgotten or lost, for the sake of international law and of the Americas.

It would take too long, and be inappropriate in this brief comment, to enumerate the international law studies made by the former Institute. Dozens of questions that are problems of the theory and the application of international law were studied and were the subject of important individual papers, opinions, discussions, and conclusions. Moreover, in the preparation of these studies a great deal of information was accumulated. It may, however, be permissible to mention what may be considered the fundamental accomplishment of the former Institute: the Declaration of the Rights and Duties of Nations, drafted in 1916.

That Declaration, distributed and known throughout the world, commented upon by the most eminent jurists and writers on international law in all countries, was the natural basis of all later studies. It attained a success seldom won by academic labors, for it was the basis and gave the content and almost wholly the form to the Convention on Rights and Duties of States concluded at the Seventh International Conference of American States in Montevideo in 1933, a convention that today is positive international law for the greater part of the American countries.

Notwithstanding recent changes in the importance of many problems and questions of international law and in spite of the emergence of new theories and conditions, the American Institute of International Law could, if it were reorganized, devote its attention to such specific matters as inter-American political and economic relations and those of the Americas with other continents; research in American international and diplomatic history; the relations of all kinds between the United Nations and the Americas; and also the problems presented by the special American conditions and customs in the field of international law.

ALBERTO ULLOA

[ED. NOTE:

At the meeting of the Executive Council of the Society on November 3, 1956, one of the members spoke of the proposed revival of the American Institute of International Law, referring to the interest of a number of Latin American jurists, particularly Professor Ulloa, and suggesting that even if funds were not immediately available which would enable members of the Institute to assemble for annual meetings, it might be possible to revive the Institute as a means of co-ordinating the activities of the national societies of international law. The suggestion was supported by the Honorary Editor-in-Chief, who reminded the members of the significant contribution the Institute had made in preparing draft conventions for the International Conference of Jurists that met at Rio de Janeiro in 1927. The record of the establishment of the Institute and of its activities may be found in numerous articles in the JOURNAL, Vols. 6-22, and particularly in the Special Supplements for 1926 and 1928.]

THE HAGUE ACADEMY OF INTERNATIONAL LAW
28TH SESSION

The Hague Academy of International Law will hold its 28th session at the Peace Palace, in The Hague, from July 15 to August 10, 1957. The course will consist of lectures on subjects of public and private international law delivered in either English or French. Translations in the other language will be provided for students whose knowledge of English or French is not sufficient to enable them to follow the lectures. Three lecture periods will be held in the mornings from Monday to Friday of each week, and one or two seminar periods will be held on some afternoons. The program of lectures is as follows:

Historical development of international law: Contemporary Sociological Theories and International Law, by B. Landheer, Director of the Library of the Peace Palace; Legal Questions Arising from the Evolution of Atomic Science, by Professor R. Charlier, Faculty of Law, University of Paris; The Present Evolution of the Laws of War, by Miguel A. Marin, Secretariat of the United Nations.

Principles of public international law: General course by Sir Gerald Fitzmaurice, Legal Adviser to the British Foreign Office; The Definition

of Aggression and International Law—Recent Developments, by Professor Jaroslav Zourek, Faculty of Law, Charles University, Prague.

Private international law: Present Tendencies in the Codes and Most Recent Draft Laws Concerning Private International Law, by Professor Hans Lewald, Faculty of Law, University of Basle.

Public administration, economics and finance: International Administrative Jurisdictions and Their Case Law, by Madame Suzanne Bastid, Professor, Faculty of Law, University of Paris.

International organization: Legal Problems of European Integration, by A. H. Robertson, Counselor, Office of the Clerk of the Assembly, Council of Europe; *Public International Law as Applied by National Tribunals*, by Professor Hermann Mosler, University of Heidelberg; *Procedural Problems in International Jurisprudence*, by Professor Gabriele Salvioli, University of Florence; *Comparison of Legal and Diplomatic Processes*, by Professor Hardy C. Dillard, School of Law, University of Virginia.

A program note states that the translation of all the courses will be read simultaneously in another room.

The Academy is open to those who already have some background in international law and wish to increase their knowledge of the subject. Applications for admission to the session are subject to approval by the Administrative Council of the Academy. A registration fee of ten florins will be charged. Application forms and information concerning conditions of admission may be obtained from the Secretariat of the Academy, the Peace Palace, The Hague.

A number of scholarships are available for the session.¹ Some are provided by the Academy, and others are given by various governments, government agencies, learned societies and private foundations. The scholarships awarded by the Administrative Council of the Hague Academy are in the amount of 300 guilders each. Applications for such scholarships must be made by the applicants directly to the Secretariat of the Academy and must be accompanied by a written recommendation by a professor of international law, as well as by copies of any scientific publications.

The Curatorium of the Academy calls to the special attention of professors of international law these scholarships, which enable students of merit, whose means are limited, to attend the Academy courses, and expresses the hope that the professors will encourage applications by candidates whom they consider to possess special merit. The *Bulletin* of the Hague Academy (No. 27) for 1957 indicates that the Curatorium received 118 applications for scholarships in 1956, representing 29 nationalities. The recipients were chosen from those applicants who had written essays, articles in periodicals or books of merit on a subject of international law. It is hoped that students of international law in the United States who are qualified will be encouraged to make application for such scholarships.

¹ See 50 A.J.I.L. 429-430 (1956).

*Center for Studies and Research in International Law and
International Relations*

The Hague Academy has also announced the establishment of a Center for Studies and Research in International Law and International Relations, made possible by a financial grant from the Rockefeller Foundation. The Center will be under the management of the Academy organs, and will function within the framework of its teaching activities for a stated period during the summer of each year. For the year 1957 the Center will hold a session from August 19 to September 28. Participants in the 1957 activities of the Center will be limited to thirty, fifteen to carry out their research work in the French-speaking section, and fifteen to carry out research in the English-speaking section. The work of each section will be conducted by a Director of Studies.

The Directors of Studies for the 1957 session are Dr. Alwyn V. Freeman, for the English-speaking section, and Mr. Lazare Kopelmanas, for the French-speaking section. Dr. Freeman is on the staff of the Foreign Relations Committee of the United States Senate. Mr. Kopelmanas is Juridical Counselor of the Economic Commission for Europe.

The curriculum for both sections for the 1957 session of the Center will consist of the detailed study of the legal questions relating to the decisions of the International Court of Justice in the *Corfu Channel Case* (April 9, 1949) and in the *Nottebohm Case* (April 6, 1955).

Admission to the Center is open only to persons having advanced university diplomas or the Diploma of the Academy, or who have at least three years of actual practice in international affairs. Those admitted to the Center will be expected to take an active part in its scientific work which should be effective and uninterrupted. The number of participants will be limited, the Administrative Council of the Academy each year fixing the number to be admitted. The Administrative Council will also publish the list of subjects to be studied and the names of the Directors of Studies for each yearly session.

There will be no admission fee for 1957. Participants will receive an allowance of 15 florins for each day of presence and participation in the work of the Center. The Curatorium will also have at its disposal a certain amount of money to be allotted in financial aid to those persons taking part in the session whom it considers to be particularly deserving of support, having regard to their qualifications, their personal situation, and the distance from their habitual residence.

Applications for admission to the Center will be subject to approval by the Curatorium of the Academy, and must reach the Curatorium not later than February 15, 1957.

ELEANOR H. FINCH

JUDICIAL DECISIONS

BY BRUNSON MACCHESNEY

Of the Board of Editors

*Jurisdiction—use of trademark in foreign country by foreign owner—
foreign acts of state—execution of treaties—Convention for the
Protection of Industrial Property—the Lanham Act*

VANITY FAIR MILLS, INC. v. T. EATON Co. 234 F.2d 633.

U.S.Ct.A., 2nd Circuit, June 1, 1956. Waterman, Ct.J.

In this action by an American manufacturer to enjoin a Canadian corporation from using in Canada or the United States a trademark registered by the latter in Canada and alleging both trademark infringement and unfair competition in both countries, the District Court had dismissed the complaint in its entirety on the grounds of no jurisdiction over the acts alleged in Canada, or, alternatively, on *forum non conveniens*, and that the Canadian and American issues were too intertwined to warrant trial on the American issues, but with leave to amend and state the American issues separately. 133 F.Supp. 522, noted in 50 A.J.I.L. 147 (1956). The Court of Appeals affirmed, saying in part:¹

I. The International Convention

Plaintiff asserts that the International Convention for the Protection of Industrial Property (Paris Union), 53 Stat. 1748 (1883, as revised 1934), T.S. No. 941, to which both the United States and Canada are parties, is self-executing; that by virtue of Article VI of the Constitution it is a part of the law of this country which is to be enforced by its courts; and that the Convention has created rights available to plaintiff which protect it against trade-mark infringement and unfair competition in foreign countries. Plaintiff would appear to be correct in arguing that no special legislation in the United States was necessary to make the International Convention effective here, but it erroneously maintains that the Convention created private rights *under American law* for acts of unfair competition occurring in foreign countries.

The International Convention is essentially a compact between the various member countries to accord in their own countries to citizens of the other contracting parties trade-mark and other rights comparable to those accorded their own citizens by their domestic law. The underlying principle is that foreign nationals should be given the same treatment in each of the member countries as that country makes available to its own citizens. In addition, the Convention sought to create uniformity in certain respects by obligating each member nation "to assure to nationals of countries of the Union an effective protection against unfair competition."

¹ Footnotes omitted.

The Convention is not premised upon the idea that the trade-mark and related laws of each member nation shall be given extraterritorial application, but on exactly the converse principle that each nation's law shall have only territorial application. Thus a foreign national of a member nation using his trade-mark in commerce in the United States is accorded extensive protection here against infringement and other types of unfair competition by virtue of United States membership in the Convention. But that protection has its source in, and is subject to the limitations of, American law, not the law of the foreign national's own country. Likewise, the International Convention provides protection to a United States trade-mark owner such as plaintiff against unfair competition and trade-mark infringement in Canada—but only to the extent that Canadian law recognizes the treaty obligation as creating private rights or has made the Convention operative by implementing legislation. Under Canadian law, unlike United States law, the International Convention was not effective to create any private rights in Canada without legislative implementation. However, the obligations undertaken by the Dominion of Canada under this treaty have been implemented by legislation, most recently by the Canadian Trade Marks Act of 1953, 1-2 Elizabeth II, Chapter 49. If plaintiff has any rights under the International Convention (other than through § 44 of the Lanham Act, discussed below), they are derived from this Canadian law, and not from the fact that the International Convention may be a self-executing treaty which is a part of the law of this country.

II. The Lanham Act

Plaintiff's primary reliance is on the Lanham Act, 15 U.S.C.A. §§ 1051-1127, 60 Stat. 427, a complex statute conferring broad jurisdictional powers on the federal courts. Plaintiff advances two alternative arguments, the first one based on the decision of the Supreme Court in *Steele v. Bulova Watch Co.*, 1952, 344 U. S. 280, 73 S.Ct. 252, 97 L.Ed. 319, giving the provisions of the Lanham Act an extraterritorial application against acts committed in Mexico by an American citizen, and the second based specifically on § 44 of the Act, 15 U.S.C.A. § 1126, which was intended to carry out our obligations under the International Conventions.

A. *General Extraterritorial Application of the Lanham Act—the Bulova Case.*

Section 32(1)(a) of the Lanham Act, 15 U.S.C.A. § 1114(1)(a), one of the more important substantive provisions of the Act, protects the owner of a registered mark from use "in commerce" by another that is "likely to cause confusion or mistake or to deceive purchasers as to the source of origin" of the other's good[s] or services. "Commerce" is defined by the Act as "all commerce which may lawfully be regulated by Congress." § 45, 15 U.S.C.A. § 1127. Plaintiff, relying on *Steele v. Bulova Watch Co.*, 1952, 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 252, argues that § 32(1)(a) should be given an extraterritorial application, and that this case falls within the literal wording of the section since the defendant's use of the mark "Vanity Fair" in Canada had a substantial effect on "commerce which may be [*sic*] lawfully be regulated by Congress."

While Congress has no power to regulate commerce in the Dominion of Canada, it does have power to regulate commerce "with foreign Nations, and among the several States." Const. art. 1, § 8, cl. 3.

This power is now generally interpreted to extend to all commerce, even intrastate and entirely foreign commerce, which has a substantial effect on commerce between the states or between the United States and foreign countries. *Thomsen v. Cayser*, 1917, 243 U.S. 66, 88, 37 S.Ct. 353, 61 L. Ed. 597; *N.L.R.B. v. Jones & Laughlin S. Corp.*, 1937, 301 U. S. 1, 57 S.Ct. 615, 81 L. Ed. 893; *Mandeville Island Farms v. American Crystal Sugar Co.*, 1948, 334 U. S. 219, 68 S.Ct. 996, 92 L.Ed. 1328; *Moore v. Mead's Fine Bread Co.*, 1954, 348 U. S. 115, 75 S.Ct. 148, 99 L.Ed. 145; *Branch v. Federal Trade Commission*, 7 Cir., 1944, 141 F.2d 31. Particularly is this true when a conspiracy is alleged with acts in furtherance of that conspiracy taking place in both the United States and foreign countries. *United States v. Sisal Sales Corporation*, 1927, 274 U. S. 268, 47 S.Ct. 592, 71 L.Ed. 1042; *United States v. Imperial Chemical Industries*, D.C.S.D.N.Y. 1951, 100 F. Supp. 504; see Note, *Application of the Anti-Trust Laws to Extra-Territorial Conspiracies*, 49 Yale L. J. 1312 (1940) and cases cited therein. Thus it may well be that Congress could constitutionally provide infringement remedies so long as the defendant's use of the mark has a substantial effect on the foreign or interstate commerce of the United States. But we do not reach this constitutional question because we do not think that Congress intended that the infringement remedies provided in § 32(1)(a) and elsewhere should be applied to acts committed by a foreign national in his home country under a presumably valid trade-mark registration in that country.

The Lanham Act itself gives almost no indication of the extent to which Congress intended to exercise its power in this area. While § 45, 15 U.S.C.A. § 1127, states a broad definition of the "commerce" subject to the Act, both the statement of Congressional intent in the same section and the provisions of § 44, 15 U.S.C.A. § 1126, indicate Congressional regard for the basic principle of the International Conventions i.e., equal application to citizens and foreign nationals alike of the territorial law of the place where the acts occurred. And the Supreme Court, in *Steele v. Bulova Watch Co.*, 1952, 344 U. S. 280, 73 S.Ct. 252, 97 L.Ed. 319, the only other extraterritorial case since the Lanham Act, did not intimate that the Act should be given the extreme interpretation urged upon us here.

In the *Bulova* case, *supra*, the Fifth Circuit, 194 F.2d 567, assuming that the defendant had a valid registration under Mexican law, found that the district court had jurisdiction to prevent the defendant's use of the mark in Mexico, on the ground that there was a sufficient effect on United States commerce. Subsequently, the defendant's registration was canceled in Mexican proceedings, and on review of the Fifth Circuit's decision, the Supreme Court noted that the question of the effect of a valid registration in the foreign country was not before it. The Court affirmed the Fifth Circuit, holding that the federal district court had jurisdiction to prevent unfair use of the plaintiff's mark in Mexico. In doing so the Court stressed three factors: (1) the defendant's conduct had a substantial effect on United States commerce; (2) the defendant was a United States citizen and the United States has a broad power to regulate the conduct of its citizens in foreign countries; and (3) there was no conflict with trade-mark rights established under the foreign law, since the defendant's Mexican registration had been canceled by proceedings in Mexico. Only the first factor is present in this case.

We do not think that the *Bulova* case lends support to plaintiff; to the contrary, we think that the rationale of the Court was so thoroughly based on the power of the United States to govern "the conduct of

its own citizens upon the high seas or even in foreign countries *when the rights of other nations or their nationals are not infringed*," that the absence of one of the above factors might well be determinative and that the absence of both is certainly fatal. Plaintiff makes some argument that many American citizens are employed in defendant's New York office, but it is abundantly clear that these employees do not direct the affairs of the company or in any way control its actions. The officers and directors of defendant who manage its affairs are Canadian citizens. Moreover, the action has only been brought against Canadian citizens. We conclude that the remedies provided by the Lanham Act, other than in § 44, should not be given an extra-territorial application against foreign citizens acting under presumably valid trade-marks in a foreign country.

B. Section 44 of the Lanham Act.

Plaintiff's alternative contention is that § 44 of the Lanham Act, which is entitled "International Conventions," affords to United States citizens all possible remedies against unfair competition by foreigners who are nationals of convention countries, including the relief requested in this case. Subsection (b) of § 44 specifies that nationals of foreign countries signatory to certain named conventions (including the Paris Union signed by Canada) are "entitled to the benefits * * * [of the Act] to the extent * * * essential to give effect to [the conventions]." Subsection (g) then provides that the trade names of persons described in subsection (b), i.e., nationals of foreign countries which have signed the conventions, "shall be protected without the obligation of filing or registration whether or not they form parts of marks," and subsection (h) provides that the same persons "shall be entitled to effective protection against unfair competition * * *". Finally, subsection (i) provides that "citizens or residents of the United States shall have the same benefits as are granted by this section to persons described in subsection (b) * * *". Thus § 44 first implements the international agreements by providing certain foreign nationals with the benefits contained in those agreements, then, in subsection (i), places American citizens on an equal footing by providing them with the same benefits. See *American Auto. Ass'n v. Spiegel*, 2 Cir., 1953, 205 F.2d 771; *L'Aiglon Apparel v. Lana Lobell, Inc.*, 3 Cir., 1954, 214 F.2d 649. Since American citizens are given only the same benefits granted to eligible foreign nationals, the benefits conferred on foreign nationals must be examined to see whether they have any extraterritorial application.

The benefits provided by § 44 (without attempting to be exhaustive) may be summarized as follows: a foreign national may register his foreign mark upon the production of a certificate of registration issued by his country of origin, even though he has not used his mark in United States commerce, § 44(c), 15 U.S.C.A. § 1126(c); in determining priority of filing, if the foreign national has filed for registration in the United States within six months after filing abroad, he may make use of his foreign filing date but if his foreign registration antedates the six month period, he may use only his United States filing date, § 44(d), 15 U.S.C.A. § 1126(d); a foreign national may register his foreign mark on the Principle Register if they are eligible, and, if not, on the Supplemental Register, § 44(e), 15 U.S.C.A. § 1126(e); a foreign national may prevent the importation into the United States of goods bearing infringing marks or names, § 42, 15 U.S.C.A. § 1124;

once a foreign mark has been registered under the Lanham Act, its status in the United States is independent of the continued validity of its registration abroad, and its duration, validity, and transfer in the United States are governed by "the provisions of this chapter," § 44(f), 15 U.S.C.A. § 1126(f). It will be noted that all of these benefits are internal to the United States in the sense that they confer on foreign nationals certain rights in the United States. None of them could have extraterritorial application, for all of them relate solely to the registration and protection of marks within the United States.

We now come to the two remaining benefits specified in § 44, and the ones upon which plaintiff relies: the provision in subsection (g) protecting trade names without the obligation of filing or registration, and the provision in subsection (h) entitling eligible foreign nationals "to effective protection against unfair competition" and making available "the remedies provided in this chapter for infringement of marks * * * so far as they may be appropriate in repressing acts of unfair competition." Here again, we think that these benefits are limited in application to within the United States. It is true that they are not expressly so limited, but it seems inconceivable that Congress meant by this language to extend to all eligible foreign nationals a remedy *in the United States against unfair competition occurring in their own countries*. Moreover, if § 44 were so interpreted, it would apply to commerce which is beyond the Congressional power to regulate, and a serious constitutional question would be created. In the absence of any Congressional intent to provide remedies of such extensive application, we interpret § 44 in a manner which avoids constitutional questions and which carries out the underlying principle of the International Conventions sought to be implemented by § 44—the principle that each nation shall apply its national law equally to foreigners and citizens alike.

Since United States citizens are given by subsection (i) of § 44 only the same benefits which the Act extends to eligible foreign nationals, and since the benefits conferred on those foreign nationals have no extraterritorial application, the benefits accorded to citizens by this section can likewise have no extraterritorial application. . . .

The crucial issue in this case is the validity of defendant's Canadian trade-mark registration under Canadian trade-mark law. The Canadian Registrar of Trade-Marks has registered the mark "Vanity Fair" in defendant's name and has refused registration of plaintiff's "Vanity Fair" mark on the ground that it interfered with defendant's prior registration. Sections 6 and 19 of the Canadian Trade-Mark Act of 1952 give the Canadian registrant of a trade-mark the statutory right to prevent the use in Canada of a confusing mark, unless the Canadian registration is shown to be invalid. Such a showing could be made in any Canadian court of competent jurisdiction as a defense to an infringement action brought by defendant, or plaintiff could initiate proceedings in the Exchequer Court of Canada to expunge or amend defendant's registration. §§ 18 and 56. The Exchequer Court is given exclusive jurisdiction by § 56 to expunge or amend a trade-mark registration. Under these circumstances, we do not think a United States district court should take jurisdiction over that portion of this action turning on the validity or invalidity of defendant's Canadian trade-mark.

In the first place, courts of one state are reluctant to impose liability upon a person who acts pursuant to a privilege conferred by the law of the place where the acts occurred. Restatement, Conflict of Laws

§ 382(2); Goodrich, Conflict of Laws § 94 (1939). In the second place, it is well-established that the courts of one state will not determine the validity of the acts of a foreign sovereign done within its borders. Underhill v. Hernandez, 1897, 168 U. S. 250, 18 S.Ct. 83, 42 L.Ed. 456; American Banana Co. v. United Fruit Co., 1909, 213 U. S. 347, 29 S.Ct. 511, 53 L.Ed. 826; Ricaud v. American Metal Co., 1918, 246 U. S. 304, 38 S.Ct. 312, 62 L.Ed. 733; Banco de Espana v. Federal Reserve Bank, 2 Cir., 1940, 114 F.2d 438; Bernstein v. Van Heyghen Freres Societe Anonyme, 2 Cir., 1947, 163 F.2d 246, certiorari denied 332 U. S. 772, 68 S.Ct. 88, 92 L.Ed. 357; Pasos v. Pan American Airways, 2 Cir., 1956, 229 F.2d 271. These precedents have not involved the acts of trade-mark officials of foreign countries, but their rationale would appear to extend to that situation. Moreover, in George W. Luft v. Zande Cosmetic Co., 2 Cir., 1944, 142 F.2d 536, certiorari denied 323 U. S. 756, 65 S.Ct. 90, 89 L.Ed. 606, we assumed the validity of foreign trade-mark registrations in holding that the lower court could not enjoin an American manufacturer from labeling his product with an infringing mark in the United States for shipment to foreign countries in which he had a presumably valid registered trade-mark. "We do not see upon what 'principles of equity' a court can enjoin the initiation of acts in the United States which constitute no wrong to the plaintiff in the country where they are to be consummated. Nor can we perceive upon what theory a plaintiff can recover damages for acts in the United States resulting in a sale of merchandise in a foreign country under a mark to which the defendant has established, over the plaintiff's opposition, a legal right of use in that country. Consequently neither the injunction nor the accounting should cover activities of the defendants, either here or abroad, concerned with sales in countries where the defendants have established rights superior to the plaintiff's in the name 'Zande.'" 142 F.2d at page 540.

Were this merely a transitory tort action in which disputed facts could be litigated as conveniently here as in Canada, we would think the jurisdiction of the district court should be exercised. But we do not think it the province of United States district courts to determine the validity of trade-marks which officials of foreign countries have seen fit to grant. To do so would be to welcome conflicts with the administrative and judicial officers of the Dominion of Canada. We realize that a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere. But this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country. . . .

Philippines a "foreign country" for purposes of tax statute designed to avoid double taxation

M/V NONSUCO, INC. v. COMMISSIONER OF INTERNAL REVENUE; S/S SAN VICENTE, INC. v. IBID. 234 F.2d 583.

U. S. Ct.A., 4th Circuit, June 5, 1956. Parker, C. J.

The Tax Court had held that earnings of Philippine flag vessels prior to July 4, 1946, were not exempt from U. S. income taxation on the same basis as the earnings of other foreign flag vessels under Section 231(d)(1) of the

Internal Revenue Code of 1939, 26 U.S.C.A. § 231(d)(1).¹ Petitioners were corporations organized under the Commonwealth laws in 1939 and 1940, and claimed exemption under the statute from the time of approval of the Philippine Act, June 10, 1941, granting reciprocal exemption to United States vessels. The Commissioner contended that (1) the exemption was not reciprocal because the Philippine Act excepted income derived from Philippine coastwise trade, and (2) that the Philippines were not a "foreign country" within Section 231(d)(1). Both the Tax Court and the Fourth Circuit rejected the first contention on the ground that the U. S. tax law must be read together with the Merchant Marine Act of 1920, 46 U.S.C.A. § 883, which forbade coastwise trade other than in vessels built in and documented under U. S. laws.

On the second contention, the Tax Court had sustained the Commissioner. Reversing the Tax Court, the court (Parker, C. J.) said in part:²

... In this [the Tax Court's position] we think that the Tax Court failed to follow the realistic approach to the problem which it had followed on the question of the equivalence of the exemptions and that it gave an interpretation to section 231(d)(1) justified neither by the language nor the spirit of that section when it is considered, as it must be, in connection with other legislation and the evident purpose which Congress had in mind in its passage. That section is as follows:

"§ 231. *Tax on foreign corporations* * * *

"(d) *Exclusions*. The following items shall not be included in gross income of a foreign corporation and shall be exempt from taxation under this chapter:

"(1) *Ships under foreign flag*. Earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States."

The question is not whether the Philippines, at all times and for all purposes, were to be deemed a country foreign to the United States prior to their independence on July 4, 1946, Proclamation No. 2695, U. S. Code Cong. Service 1946, p. 1731, but whether vessels flying the flag of the Philippines and documented under their laws should be deemed to be documented under the laws of a foreign country within the meaning of the exclusion above quoted from the section 231(d) of the Internal Revenue Code of 1939. In this connection it should be noted that at the time of the adoption of the Code the Philippines and the United States had long had separate tax laws, subject to the control of their respective legislatures, separately administered by their respective governmental agencies, with revenues accruing to their respective governments. *Robinette v. Commissioner*, 6 Cir., 139 F.2d 285. Since 1920, Philippine ships have been registered and documented under the laws of the Philippines and not under the laws of the United States. They have flown the flag of the Philippines and have been treated as foreign vessels for all purposes. And the Philippines have been treated as foreign territory within the purview of our shipping laws. See 46 U.S.C. §§ 877, 883, 1222, 1241.

While the treatment accorded the Philippines both in the tax laws and shipping laws would indicate without more that Philippine vessels

¹ 23 T.C. 361.

² Footnotes omitted.

should be held to be embraced within the exclusion of the section under consideration, this becomes even clearer when it is remembered that following the Philippine Independence Act of March 24, 1934, c. 84, 48 Stat. 456, the Philippines adopted their own Constitution in 1935 and since then have functioned as an independent country except with respect to a few matters necessitated by the protectorate exercised by the United States pending complete independence. . . .

When we consider the purpose of the exclusion clause, we think it perfectly clear that Philippine vessels should be held to be embraced within its provisions. The purpose of the clause (first enacted as 213(b)(8) of the Revenue Act of 1921,⁴² Stat. 239) was "to encourage the international adoption of uniform tax laws affecting shipping companies, for the purpose of eliminating double taxation, * * *." S. Rep. 275, 67th Cong. 1st Sess. p. 14. A foreign country within the scope of this purpose would be one which exercised, as did the Philippines, the power of taxation over the earnings of ships engaged in commerce. Congress was not dealing with such questions as were presented in the Insular cases, but with the exercise of the power of taxation by those who were exercising that power and was attempting to eliminate the evil of double taxation by holding out the proffer of a reciprocal exemption. . . .

There was just as much reason to extend the offer of a reciprocal exemption to the Philippines as to any other country exercising the power to tax shipping and, in truth, a stronger reason; for we were exercising a benevolent guardianship over the development of the Philippines and were doing everything within our power to foster the development of their trade and commerce. . . .

NOTE: In *Burna v. U. S.*, 142 F. Supp. 623 (D.C.E.D.Va., July 13, 1956, Hoffman, J.), action by U. S. citizen, under the Federal Tort Claims Act, for injuries sustained in Okinawa, was dismissed on the ground it was a "claim arising in a foreign country" under that Act. Plaintiff argued the Treaty of Peace with Japan¹ changed Okinawa's status. The court, relying on Secretary Dulles' statement that Japan under the treaty retained residual sovereignty, and on the fact Japanese laws remained in effect, disagreed.

Admiralty—authority of Foreign Service officers—the United States as a litigant in civil causes

THE REPUBLIC OF CHINA ET AL. v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA ET AL. 142 F. Supp. 551. U. S. Dist. Ct. D. Maryland, July 9, 1956. Thomsen, C. J.

The United States and the Republic of China libeled the respondent insurance companies to recover on marine and war risk policies issued on vessels which had been sold to Nationalist China by the United States and on which the United States held preferred ship mortgages. The crews of the ships defected to the Chinese Communist Government in January, 1950, and have retained possession. The libelants' efforts to recover the ships have been unsuccessful. Respondents moved to dismiss the libels on the ground, *inter alia*, that the United States had refused to answer an

¹ 3 U.S.T. 3169; T.I.A.S., No. 2490; 136 U.N.T.S. 45.

interrogatory requesting memoranda of oral conversations asking consent of the British Government to issue an Order in Council permitting suit on one of the vessels in Singapore without regard to the sovereign immunity of the Chinese Communist Government. This request was denied. The United States had furnished all other information requested concerning this issue. The United States refusal was based on the prejudice to foreign relations and to the public interest that such disclosure would cause, and was supported by a determination to that effect by Secretary Dulles, pursuant to applicable regulations. In denying the motion, the court said in part:

The only interrogatory not fully answered by the Government asks for the author, date and custody of any memorandum or memoranda pertaining to the oral request for an order in council. The documents already filed show that this oral request was made pursuant to written instructions from the State Department, and was followed some time later by the formal written request. The written request, the two letters of instructions from the State Department to the Embassy, and the two British replies have all been made available to respondents. The interrogatory in question is evidently preliminary to a motion under Admiralty Rule 32 for the production of the memorandum or memoranda. That rule, like Civil Rule 34, 28 U.S.C.A., requires an applicant to show good cause for the production of the documents desired, and "show that they are not privileged and material to the matter involved." *United States v. 5 Cases, etc.*, D. C. Conn., 9 F.R.D. 81, at page 83, Hincks, J., affirmed 2 Cir., 179 F.2d 519; *Hickman v. Taylor*, 329 U. S. 495, 508, 67 S.Ct. 385, 91 L.Ed. 451.

Respondents hope to find in the memorandum or memoranda some notation or statement by a foreign service officer which can be offered in evidence against the United States as an admission against interest, or some evidence that the United States did not use its "utmost endeavor" to secure an order in council. *Quaere*: Do respondents mean legal, political or military endeavor?

It is doubtful whether the information sought by respondents would be competent evidence against the United States in these cases. Foreign service officers may make official representations only "as directed by the Department." *Foreign Service Manual*, Vol. 4 (Political Affairs), sec. 031.2(b); *Story on Agency*, sec. 307a; *Whiteside v. United States*, 93 U. S. 247, 257, 23 L. Ed. 882; *Hawkins v. United States*, 96 U. S. 689, 691, 24 L. Ed. 607. But it is not necessary to decide that question at this time. Interrogatories are not limited to evidence which would be admissible at the trial. *Foundry Equipment Co. v. Carl-Mayer Corp.*, D. C., 11 F.R.D. 108, 109, *Hornung v. Eastern Auto Forwarding Co.*, D. C., 11 F.R.D. 300, 301. . . .

It is, of course, generally true that the United States, like any other litigant, is subject to the Federal Rules of Civil Procedure, and may not refuse "to make the same sort of disclosure of its case as would be required of an individual plaintiff." *United States v. General Motors Corp.*, D. C. N.D. Ill., 2 F.R.D. 528, 530. See also *Bowles v. Ackerman*, D.C.S.D.N.Y., 4 F.R.D. 260, 262; *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451. The Government has made such disclosure in this case. Respondent insurance companies have already had full discovery of all commercial-type information in the Govern-

ment's files. They seek also political information of activities which affect the foreign relations and public interest of the people of the United States. When respondents issued their insurance policies they knew, or should have known, that where military secrets and similar matters are at stake, certain information is privileged. "In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege, if the court is ultimately satisfied that military secrets are at stake. *A fortiori*, where necessity is dubious, a formal claim of privilege * * * will have to prevail." *United States v. Reynolds*, 345 U.S. 1, 11, 73 S.Ct. 528, 533, 97 L. Ed. 727.

In the case at bar the only reason for the refusal of the United States to supply the information requested is the determination by the Secretary of State that its disclosure "would be prejudicial to the foreign relations of the United States, and contrary to the public interest." In view of the differences of opinion between the American and British Governments over the British recognition of Communist China and the many problems arising therefrom, that determination appears to be clearly justified. See discussion in the United States Senate referred to above; discussion in House of Commons on May 24, 1950, Vol. 475, Parliamentary Debates, col. 2070, 2084; and Fitzsimons, *The Foreign Policy of the British Labour Government, 1945-1951*, University of Notre Dame Press, pp. 133, et seq.

Respondents themselves are claiming a privilege, different in character but similar in effect, in refusing to disclose what their London solicitors, Messrs. Constant and Constant, learned from the British Foreign Office. Some of the information requested by the interrogatories could not be supplied by the United States unless and until the British Government waived its privilege in connection therewith. 4 Moore, *Int'l Law Digest* (1906), pp. 717, et seq., *Intercourse of States*, Official Correspondence, sec. 684. Publication of Correspondence. That waiver was finally obtained and respondents were furnished with the papers. In the meantime proctors for the United States had suggested to proctors for respondents that their clients, who have offices in London, might be able to obtain the desired information directly from the British Foreign Office. Respondents engaged Messrs. Constant and Constant, a firm of solicitors in London, to obtain this information, and Her Majesty's Principal Secretary of State for Foreign Affairs advised the United States Ambassador on December 13, 1954, that information had been supplied to Messrs. Constant and Constant. The solicitors reported what they learned to respondents and their proctors, and the United States has moved the court to require respondents to disclose the information so obtained. Respondents oppose the motion on the ground that communications from counsel to client are privileged. I doubt whether this information comes within the privilege. But I have sustained respondents' continued objection to its disclosure, after telling them that I will infer from their objection that the evidence suppressed would be contrary to their argument, i.e., that the information furnished by the Foreign Office to Constant and Constant would support the contention made by the United States, that the information which respondents seek to obtain by means of the interrogatory in question is immaterial. *Mammoth Oil Co. v. United States*, 275 U. S. 13, 48

S.Ct. 1, 72 L.Ed. 137; *The Algie*, D.C.E.D.N.Y., 56 F.2d 388; *Baltic Cotton Co. v. United States*, D C.S.C.Ala., 50 F.2d 257.

As the Reynolds case points out, there is a clear distinction between criminal cases prosecuted by the United States and civil cases, such as this. Here, as in the Reynolds case, the necessity for the disclosure of the information requested is dubious, and the reason for sustaining the claim of privilege is clear.

The question before the court is whether the refusal of the United States to supply the information requested in the one interrogatory which has not been fully answered should bar its recovery under the insurance policies in suit. It would be most unjust to give it that effect, in view of the reason for its refusal, the other information supplied by the United States, and the other sources of information available to respondents. Interrogatories "are not to be used as a device or a stratagem to maneuver the adverse party into an unfavorable tactical position. To do so is to pervert a remedy designed to advance the disposition of controversies on their merits, into a weapon to revive what has been aptly denominated as 'the sporting theory of justice'—the very shortcoming of the old procedure that the new rules were designed to cure." *Aktiebolaget Vargos v. Clark*, D.C.D.C., 8 F.R.D. 635, 636, Holtzoff, J.

Meaning of "war risks" clause in charter-party—deviation by order of "any government" includes government on Formosa although not recognized by British Government—certificate by Foreign Office not conclusive

LUIGI MONTA v. CECHOFRACHT Co., LTD. [1956] 2 All E.R. 769.

Q. B., June 14, 1956. Sellers, J.

Vessel of Italian registry and owned by Italian subject was chartered by Czech company for voyage from North China to European ports in 1953. Under the "war risks" clause, the vessel could comply with directions given "by the government of the nation under whose flag the vessel sails . . . or any other government," and the clause further specified that delivery under such directions constituted performance and freight was payable accordingly. At the time of leaving a North China port, hostilities between the two governments of China were occurring occasionally and the Korean hostilities continued. Chinese Nationalist authorities intercepted the vessel, and ordered it to discharge its cargo in a Formosan port. At the relevant times, the Nationalist authorities controlled Formosa, and were recognized by Italy as the Government of China, but the British Foreign Office responded to inquiries that Her Majesty's Government (a) had ceased to recognize the former Nationalist Government as the *de jure* or *de facto* government of China, and (b) did not recognize that any government was located in Formosa.

Pursuant to arbitration provided for in the charter-party, the umpire decided for the shipper on the ground that the authorities on Formosa were a government, and that the vessel was therefore within the "war risks" clause. On appeal, the charterer contended that the statement of the Foreign Office was conclusive and therefore that the directions were not given by a government.

The court affirmed the award in favor of the shipowner. It construed the clause as referring to a national government. On the question of the conclusiveness of the statement of the Foreign Office, the court stated:

If the view of the Foreign Office is not to be held as conclusive, or as exclusive of all other evidence, it was not submitted by the charterers that there was no evidence to establish or justify the finding in the award. It was, however, strongly submitted that the court could not go behind or beyond the Foreign Office statement.

The Contract is a commercial document in common use by traders of many nationalities. It is described as a uniform general charter, apparently prepared, issued and recommended by the Documentary Council of the Baltic and White Sea Conference, and adopted by the Documentary Committee of the Chamber of Shipping of the United Kingdom. Of the parties to this charterparty, the shipowner is an Italian, and the charterers are a Czech company. The charterers had the right to transfer the charterparty to a German party but the original charterers were to remain liable for its right and true fulfillment. The charterparty provided for arbitration in London in the event of any dispute, and that permitted the present application to the court under s. 21(1)(b) of the Arbitration Act, 1950. The parties were agreed that the proper law of the charterparty was English law.

As a matter of construction of the charterparty, an ordinary trading or commercial contract, there would seem to me to be no ground for saying that the authority giving the orders or directions has to be a government recognised as such by Her Majesty's government here. It does not say so and I see no circumstances which require such a construction or which would give rise to any implication to that effect. The umpire, in my judgment, has not erred in that respect.

Is there a rule of law which restricts the evidence to be considered to that provided by the Foreign Office, or which precludes the tribunal of fact from finding that there was a government in Formosa on all the evidence which was adduced?

It was urged on behalf of the charterers that the umpire erred in not treating the Foreign Office statement as final and conclusive, and reliance was placed on *White, Child & Beney, Ltd. v. Simmons* ((1922), 127 L.T. 571) and *Duff Development Co. v. Kelantan Government* ([1924] A.C. 797) and other cases. In my judgment, the authorities, as far as they have been cited or are known to me, do not establish the proposition contended for and did not require the umpire to disregard any of the evidence put before him whether or not there was a government in Formosa.

It seems to me to be a very different question from a Sovereign seeking immunity from the jurisdiction of our court. . . . It may well be undesirable that in such a matter a conflict should arise between Her Majesty's government and a British court. . . .

In *White, Child & Beney, Ltd. v. Simmons* ((1922), 127 L.T. 571) on which both parties seemed to rely, a question arose whether a claim for loss of insured property was a loss or confiscation by the government of the country in which the property was situated. The matter arose at the time of the Russian revolution. ROCHE, J., had held that the evidence, from all sources, had not established that the Russian Soviet Republic was at the time of the loss recognised as a sovereign government and that the claim succeeded, as the loss was a loss "by rebellion, military, or usurped power" within the meaning of the policy. The loss or confiscation by the government would have

defeated the claim as outside the policy. Apparently the Soviet authority was not recognised by our government at the time of the loss, but was recognised at a later date, and the Court of Appeal held in these circumstances that the court could look at all the facts and see whether the government as later recognised as the de facto government of Russia was or was not the de facto government of Russia at the earlier material date. The British Foreign Office had declined to state the precise date at which the existing Soviet authority came into being as a government, and that the court was entitled to give effect to the evidence even if it was inconsistent with the opinion given by the Foreign Office (per ATKIN, L. J. (127 L.T. at p. 584)).

Apparently, the government situated and functioning in Formosa was at one time recognised by this country, and it does not follow that because recognition has ceased that the government, once recognised, has in any way altered its activities or lost such powers and authority as it had been exercising. Without the recognition of our government, in *White, Child & Beney, Ltd. v. Simmons*, it might well have been impossible for the court to have found on the evidence that the usurping forces had reached such ascendancy that they had supplanted the existing government. It was held that the usurping forces had supplanted the existing government at a time when our country had not recognised the substitution, and it does not appear to me to be an authority for the proposition that if there is no recognition there is no government. Nor would it seem that recognition or non-recognition would in any way affect the risk of a vessel being accosted on her voyage.

I would hold that the umpire was entitled to approach the question in the same manner as GODDARD, J., did in *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham S.S. Co., Ltd.* ([1938] 3 All E.R. 80), approved by the Court of Appeal ([1939] 1 All E.R. 819), and that the reasoning in the judgment of SIR WILFRED GREENE, M. R., is largely applicable to this case. It was held there that the question whether on the true construction of the charterparty war had broken out involving Japan was not conclusively determined by the view of His Majesty's government. GODDARD, J., said that what he had to determine was what the parties meant by the clause of the charterparty. He thought they were using the word "war" and intended it to be construed as war in the sense in which an ordinary commercial man would use it. He did not think the parties in a case of this sort were going into the niceties of international law (see [1938] 3 All E. R. at p. 83); and, may I add, as applicable to this case, into the niceties of diplomacy. . . .

Foreign tribunal—jurisdiction of English court—requests for examination of witnesses and documents—discovery against persons not parties to suit

RADIO CORP. OF AMERICA v. RAULAND CORP. [1956] 1 Q. B. 618.

Lord Goddard, C. J.; Devin and Hilbery, JJ.

An American corporation was plaintiff in an action in the District Court of Illinois for alleged patent infringement. Defendants (applicants in the instant case) cross-claimed that plaintiff's action in pooling patents with foreign corporations was in violation of the antitrust laws. At a pre-trial hearing, the defendants petitioned the District Court for

letters rogatory addressed to the British court to enforce a demand that certain documents in the custody of two domestic English corporations be presented for inspection and that their officers and directors be subject to examination by the defendants pursuant to the discovery and pre-trial practices of United States courts. This application was founded on the theory that such requests would be enforceable by British tribunals pursuant to the Foreign Tribunals Evidence Act of 1856. Barry, J., held that certain officials might be interrogated but denied the application for the production of documents. On appeal, the decision was affirmed as to denial of documents and reversed as to requirements that corporate directors be interrogated.

The Foreign Tribunals Evidence Act of 1856 states:

Where, upon an application for this purpose, it is made to appear to any court or judge having authority under this Act that any court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or such judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly. . . .

. . . it shall be lawful for the said court or judge, by the same order, or for such court or judge or any other judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order.

In rendering their decision the British court narrowly construed the word "testimony." Lord Devlin stated (p. 643) that

the essential principles of discovery in the United States do not seem to be very different from the principles in this country [England]; that is to say, discovery is not merely limited to the obtaining . . . of such materials as may be strictly relevant to the issues in the action . . . but it covers also the obtaining of material which might lead to a line of inquiry which would itself disclose relevant material.

However, the applicants in this action are engaged in a pre-trial discovery proceeding "which under English law they could not possibly get in order to obtain what is in effect discovery from witnesses in this country." (p. 644.)

Lord Devlin further stated (p. 646):

Testimony which is in the nature of proof for the purpose of the trial is permissible. Testimony, if it can be called "testimony," which consists of mere answers to questions on the discovery proceeding designed to lead to a train of inquiry, is not permissible.

Lord Goddard, C. J., characterized the application as a "fishing" proceeding which is never allowed in the English courts.

Sale of goods—shipment from foreign port—requirement to obtain export license from foreign government rests upon seller

M. W. HARDY & Co. v. A. V. POUND & Co. LTD. [1955] 1 Q.B. 499.

Lord Goddard, C. J.; Singleton, Romer, Scrutton, L.JJ.

By a contract of sale made in London between buyers, of New York, and sellers, of London, the sellers agreed to deliver 300 metric tons of Portuguese gum spirits of turpentine f.a.s. buyers' tank steamer at Lisbon, payment by confirmed irrevocable credit in sellers' name in Lisbon. Goods were destined to Eastern Germany, a fact known to sellers. The buyers duly sent a tanker to Lisbon to receive the merchandise which was supposed to be assembled by the seller through its Portuguese suppliers as agent. Under Portuguese law the turpentine could not be exported without an export license. The seller's suppliers applied to the Junta for such license and were refused when it was ascertained that the shipment was destined for the port of Rostock. Each party thereupon contended that a breach of contract had occurred. The sellers claimed they had not assumed the risk of a single destination and that the duty of procuring the license rested on buyer. The buyer claimed such duty rested on seller in light of his knowledge of the transaction and his dealings with his own suppliers in Portugal. A board of arbitration found for the buyers. *McNair, J.*, reversed and found for sellers. Buyers appealed, and appeal was allowed.

The court found that in order to sustain its decision it was necessary to distinguish *H. O. Brandt & Co. v. H. N. Morris & Co.*, [1917] 2 K.B. 784. In that case, the court had found that as between two domestic business concerns, responsibility for the failure to obtain an export license rested upon the buyers. However the *Brandt* case was distinguishable in that (as stated by Lord Singleton):

There was no need for a license to export at the time the contract was made. The buyers alone knew where they wished the goods to go, and to whom they wished them to go, so that they alone could supply the necessary information when the license to export the goods was required. . . . In the case we are considering an export license from Portugal was necessary at the date the contract was made. That does not appear to have been within the knowledge of the buyer, but it was known to the sellers. (pp. 508, 509.)

The court, speaking through Lord Goddard, C. J., further stated (at p. 512):

I agree with *McNair J.* that the proper law of the contract is English, but that its performance must be regulated by the law of Portugal. The buyers would not know the suppliers, nor would the sellers be likely to disclose their names to the buyers, and, at any rate, they never did. What I may, perhaps, call the impact of Portuguese law on the contract makes the vital distinction between the present case and *Brandt's* case, and, in my opinion, it was for the sellers here and not the buyers to obtain, or, at least, to do their best to obtain, a license which would enable the goods to be put alongside.

Sovereign immunity—debt as property of foreign sovereign—transfer from one sovereign to the servant of another

NIZAM OF HYDERABAD AND STATE OF HYDERABAD *v.* JUNG. [1956] 3 W.L.R. 667.

Ch.D., July 30, 1956. Upjohn, J.

Money on deposit in the Westminster Bank to the account of the Nizam of Hyderabad in September, 1948, was, at the time of the Indian invasion of Hyderabad, transferred by a person authorized to deal with the account, to the High Commissioner of Pakistan in the United Kingdom, who was directed by the Foreign Minister of Pakistan to receive the money in that capacity. The Nizam and his government brought an action against the bank, the transferor, and the transferee to recover the money. The transferee, the former High Commissioner, moved that the writ against him be set aside and that the action against the bank be stayed on the ground that the action impleaded a foreign sovereign, Pakistan, or sought to interfere with that government's right to the money. The claim to immunity was based on legal title to the debt being in the former High Commissioner for Pakistan, and not based on any claim to equitable title. Plaintiff claimed the debt was held in trust for the Nizam.

The court sustained the motion. It found no breach of trust by the transferor, and that there was no proof of equitable title in Pakistan. With reference to the contention that the action impleaded a foreign sovereign state, the court stated in part:¹

The claim to immunity can therefore only succeed in this action if it be shown that some property of the foreign sovereign is thereby affected, and it does not seem to matter very much whether or not that be described as indirect impleading.

In the next place, there has been much discussion in the authorities as to what is a sufficient interest in the property to establish a claim for immunity from process. When the subject-matter of the dispute is a chattel such as a ship or bar of gold, possession or control are very relevant matters to consider upon the claim to immunity; but in relation to a pure debt unsupported by pledge or other security such as a bearer bond, the question must depend upon title and nothing else. There can be no possession or control of a pure debt: *Haile Selassie v. Cable and Wireless Ltd.*

Next, it must now be taken as settled law that it is not sufficient to establish a claim to immunity that the foreign sovereign should merely make a claim to such property. I take the law to be as stated in the judgment of Lord Jowitt in the Privy Council in *Juan Ysmael & Co. Inc. v. Indonesian Republic Government*: "In their Lordships' opinion a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights

¹ Footnotes omitted.

and must stay the action, but it ought not to stay the action before that point is reached."

The question, then, that I have to consider is whether the Government of Pakistan establish a title to this debt which is not merely illusory or manifestly defective. It is submitted on the Government's behalf that a sufficient title is in them by reason of the fact that the legal title to the debt is admittedly in Rahimtoola in his official capacity of High Commissioner of Pakistan and in no other capacity whatever. The fact that on the evidence as it stands at present the Government show no equitable title, counsel submits, matters not. He submits (rightly, in my view) that it is well settled in the case of chattels that a proprietary interest need not be established, but possession or control is sufficient, and in such cases rightful possession or control has always been considered irrelevant. Thus, in *The Jupiter*, it was regarded as irrelevant that the possession of the U.S.S.R. was wrongful, as it was subsequently proved to be: *The Jupiter* (No. 3); but that was a case of impleading a sovereign State in an action in rem. However, in the *Dollfus Mieg* case, where no question arose of impleading the foreign governments by making them parties directly or in an action in rem, the rightfulness of the claim to some bars of gold was regarded as irrelevant.

The judgment of the Privy Council in the *Juan Ysmael* case clearly proceeded on the footing that the claim to title of the ship there in question was plainly bad, and that the claim to immunity therefore failed; but it is plain that the whole case proceeded on the footing that the Indonesian Government did not at the relevant time have possession or control of the ship, for the acting captain of the ship always remained true to his masters, the appellants. The law was briefly summarized by Lord Maugham in *The Cristina* case thus: "If the foreign government wishes to recover property in this country, I am of opinion that it must, subject to certain exceptions, prove its case. If it is, rightly or wrongly, in possession of property in this country, no action can be brought against it by persons claiming title to or any interest in such property."

Sir Andrew Clark, on the other hand, submits that Rahimtoola was a trustee of the debt for the true owner, the Nizam. He referred me to a number of authorities which he submits establish the proposition that where property such as a debt is in a third party claiming no beneficial interest therein, as in this case, then before a foreign sovereign can be said to be impleaded he must show a title to that property which is not illusory or manifestly defective. He relied on two lines of cases. The first deals with the position at common law. Lord Maugham in *The Cristina* case, put it thus: "An independent sovereign sued for breach of promise of marriage in our courts can indeed claim to be outside of our jurisdiction; but there is no authority for the view that if he wrongfully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewellery merely by stating that he claimed it. To come within Professor Dicey's rule he would in my opinion be bound to prove his title." This statement of the law, however, is not universally accepted: see the observations of Lord Jowitt in the *Dollfus Mieg* case, which I quote later.

In equity the courts have been less tolerant of a claim to immunity than at common law. Sir Andrew cited to me a number of authorities which establish the proposition that the court will not decline

jurisdiction to administer a trust fund merely because a foreign sovereign claims to be interested therein. . . .

If Rahimtoola is indeed to be regarded as truly a third party holding the debt as a trustee for the true owner, then, in my judgment, both at common law and in equity, before the Government of Pakistan can be said to be impleaded it must establish a title to the debt. That title must necessarily be an equitable title in the circumstances of this case, for the legal right to the debt is in Rahimtoola. It may be that, if a court is administering a trust, the sovereign must establish a true title, whereas at common law it is only necessary to establish a title not manifestly defective; but it is not necessary to consider that further, for in this case the sovereign establishes no title in equity, and, in my judgment, neither in law nor in equity is the sovereign impleaded.

The crux of this case, therefore, is whether Rahimtoola is to be regarded as a third party holding the debt for the true owner. Although Rahimtoola makes no claim to immunity on any ground personal to him, it seems to me clear that the debt was vested in him as an official of his Government. The debt was not vested in "the Government of Pakistan" *eo nomine*, but it was vested in a servant of that Government in his capacity as such. That was a natural course to take in the circumstance. I do not think that I ought to draw narrow distinctions between title to a debt in the name of the sovereign or his servant. . . . [Cases omitted]

Those were all cases dealing with chattels; but, in my judgment, the same reasoning ought to apply to the case of a debt. No case in this country has been cited to me which is on all fours with this case; but a claim to immunity in respect of a debt has been upheld in the District Court of New York in *Bradford v. Chase National Bank of City of New York*, [24 F.Supp. 28] a case reversed on its facts on appeal. However, the recent authorities undoubtedly contain warnings against extending the doctrine of sovereign immunity from process: see especially the observations of Lord Maugham in *The Cristina* case. • There is, then, no absolute and universal rule that a foreign independent sovereign cannot be impleaded in the courts in any circumstances: *Sultan of Johore v. Abubakar Tunku Aris Bendahar*. Furthermore, this is not a case where the foreign sovereign has brought any property to this country; it has been transferred to him by the servants of another sovereign.

In my judgment, however, the general principle must be applied. The debt being in Rahimtoola as the servant of his Government, the matter must be treated as though the debt was due to the Government, though that does not, of course, entitle the Government to claim immunity on the ground that it is being directly impleaded.

The plaintiffs, however, seek to go behind that legal title and to show that, on an investigation of the circumstances surrounding the transfer and applying the municipal law of England, the equitable title is in the plaintiffs. In my judgment, however, being, in effect, clothed with the legal title, it is to that very investigation into the equitable title which the Government of Pakistan as a sovereign State is entitled to decline to submit. In my judgment its insistence on its legal title is sufficient to support the claim to immunity, even though no equitable title is shown, and the claim would therefore seem to involve a wrong against the equitable owner.

The theory behind the claim to immunity has been variously described, and I attempt no repetition; but I think the following quota-

tion from Sir Robert Phillimore in *The Charkieh* seems particularly appropriate to the circumstances of the present case: "The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state . . ." The present transaction was an intergovernmental transaction; let it be solved by intergovernmental negotiations. The writ and concurrent writ must be set aside as against Rahimtoola.

With regard to the bank, the plaintiffs are suing the bank for the debt due at law to Rahimtoola. Proceedings must be stayed against them, for to continue to sue them is to interfere with the property of the sovereign. That is clearly the proper course when dealing with a claim in detainue: see *Dollfus Mieg*. This cannot be likened to the case of a claim for damages for conversion. In this case, unlike the claim in respect of the thirteen bars of gold in the *Dollfus Mieg* case, there is no claim for damages against the bank, nor does this case resemble the *Haile Selassie* case. The question there was to whom were Cable and Wireless Ltd. indebted? In this case, so far as the bank is concerned, there is only one answer to that question—Rahimtoola. Both Moin and Mir had authority to operate the account, and the statement of claim does not allege that the bank had any knowledge of the alleged but, as I have held, unproved breaches of duty by Moin or Mir. The plaintiffs can only reach the debt through Rahimtoola. Therefore the action against the bank must be stayed. . . .

NOTES

Jurisdiction—dependents of servicemen abroad—effect of return to United States and imprisonment in civilian jail

Rcid v. Covert (76 S.Ct. 880, 351 U. S. 487, U. S. Supreme Court, June 11, 1956, Clark, J.), is a companion case to *Kinsella v. Krueger*, 351 U. S. 470, digested in 50 A.J.I.L. 959 (1956), which decided that the court-martial of a serviceman's dependent in Japan under the Uniform Code of Military Justice was constitutional. The additional contention was made in this case that Article 2(11) of that Code providing for such trial ceased to be applicable when the prisoner was returned to the United States, and that, having been placed in a civilian jail, the prisoner was no longer in the "custody of the armed forces" within Article 2(7) of the Code. The Court, per Clark, J., rejected both contentions, and the additional contention that the ordering of a rehearing defeated the jurisdiction. As in the *Krueger* case, Frankfurter, J., reserved his opinion, and Warren, C. J., Black and Douglas, JJ., dissented. Rehearings were granted in both cases, 5 to 3. 77 S.Ct. 123, 124 (1956).

Jurisdiction—civilian employee of Armed Forces abroad—trial under Code of Military Justice abroad

The petition for habeas corpus in this case on behalf of a civilian employee of the Armed Forces stationed abroad, who was convicted by court-

martial there, was denied on several grounds. Petitioner had challenged the constitutionality of Article 2(11) of the Uniform Code of Military Justice as depriving him of a jury trial. In addition to the grounds relied on by the Supreme Court in the *Krueger* and *Covert* cases, the court held that a person in the prisoner's position never had a right to trial by jury, and also that Congress, under the necessary and proper clause, had power to implement Clause 14 in Article I, Section 8, of the Constitution, "To make Rules for the Government and Regulation of the land and naval Forces." Accordingly, for these and other reasons, Article 2(11) was held constitutional and the writ was dismissed. *In re Varney's Petition*, 141 F. Supp. 190 (U. S. Dist. Ct., S.D. Calif., Central Division, April 27, 1956, Carter, D. J.).

*Unlawful belligerency—jurisdiction of military commission to try
U. S. citizen for violations of law of war*

In *Colepaugh v. Looney*, 235 F. 2d 429 (10th Circuit, July 13, 1956), the trial by military commission of an American citizen who crossed military and naval lines of the United States to commit espionage was upheld against the prisoner's contention on habeas corpus that he was entitled to civil trial as U. S. citizen.

*Neutral alien—determination by Selective Service Director of Den-
mark's status as neutral—political matter for executive branch*

In *Brownell v. Rasmussen*, 235 F. 2d 527 (U. S. Ct.A., Dist. of Col., June 14, 1956, Washington, Ct. J.), the determination by the Selective Service Director that Denmark was a neutral country for purposes of alien's status as applicant for deferment was held to be a political question for the executive branch not subject to collateral attack. The court held also that application for deferment as a neutral alien under the Act debarred applicant from becoming a citizen even though he subsequently applied for induction during the war.

*Discharge of foreign service officer by Secretary of State—validity of
statute authorizing dismissal in Secretary's absolute discretion, even
though Executive Order procedures were not followed*

Despite the invalidity of the procedures taken under Executive Order 9835, which procedures were an alternative ground for dismissal, the court affirmed the dismissal of plaintiff's suit for declaratory judgment on the basis of Public Law 179, Sec. 104, 63 Stat. 456. *Service v. Dulles*, 235 F. 2d 215 (U. S. Ct.A., Dist. of Col., June 14, 1956, Bastian, Ct. J.).

Passport—denial by Secretary without stating grounds

In *Boudin v. Dulles*, 235 F.2d 532 (U. S. Ct.A., Dist. of Col., June 28, 1956, Washington, Ct. J.), the Secretary of State's denial of passport without stating specific ground on which he relied was held invalid.

International aviation—entry in distress—customs

In affirming judgment for libelant, the court rejected claimant's contention that involuntary entry in distress by air absolved him from the duty of declaring diamonds in his possession. The facts and excerpts from the opinion below in *U. S. v. 532.33 Carats*, 137 F. Supp. 527 (D. Mass., Jan. 19, 1955), appear in 50 A.J.I.L. 691 (1956). *Lisser v. United States*, 234 F.2d 648 (U. S. Ct.A., 1st Circuit, June 13, 1956, Hartigan, Ct. J.).

International aviation—Warsaw Convention—limitation of liability

The New York Court of Appeals affirmed unanimously in a memorandum decision the judgments of the courts below dismissing actions brought to recover for loss of cargo of gold. Plaintiffs maintained that Articles 8 and 9 of the Warsaw Convention,¹ 49 Stat. 3016, 3017, were clear, but if open for construction, it should be held that there can be no exclusion or limitation of liability without full compliance with the requirements of Article 8. They also urged error in ruling that a shipper must insure separately or be satisfied with a limited recovery under Article 22, subparagraph 2 of the convention.² *American Smelting and Refining Co. v. Philippine Air Lines*, June 8, 1956 (1 N.Y. 2d 866, 183 N.Y. S. 2d 900).

Tax treaties—liberal construction—tax on U. S. trustee for United Kingdom beneficiaries

Plaintiff, as testamentary trustee, sued to recover capital gains tax paid under protest. All the beneficiaries of the trust were residents of the United Kingdom and not engaged in trade or business in the United States. They were not, however, entitled to current income under the trust. Defendant claimed on the basis of U. S. tax law that the plaintiff was taxable on the capital gain made in 1946. Plaintiff relied on Article XIV of the Convention between the United States of America and the United Kingdom of April 16, 1945, effective January 1, 1945,³ providing:

A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets.

The court, in giving judgment for defendant, held that, despite the rule of liberal construction of treaties, there was no basis for a construction of Article XIV that income ordinarily taxable to a trustee is to be taxed to beneficiaries. The court also rejected arguments that the convention was intended to override the domestic law on this question; that if the burden of the tax falls on a United Kingdom resident, there is exemption; or that the convention intended to achieve equality of treatment in every category. *American Trust Company, Trustee, v. Smyth, Collector of Internal Revenue*, 141 F. Supp. 414 (U. S. Dist. Ct., N.D. Calif. S.D., June 4, 1956, Carter, D. J.).

¹ U. S. Treaty Series, No. 876.

² Decision of the Appellate Division was noted in 49 A.J.I.L. 93 (1955).

³ 60 Stat. (2) 1377, at 1384.

Extradition—effect of violation of treaty—department of government for determination—jurisdiction over the person and subject-matter—effect of alleged illegal abduction

In *U. S. v. Sobell*, 142 F. Supp. 515 (S.D. N.Y., June 20, 1956), Sobell claimed his expulsion from Mexico was a violation of the Extradition Treaty between the U. S. and Mexico, 31 Stat. 1818, on the ground that espionage was not a crime listed in the treaty (which was true) and that his offense was political and therefore excluded by the treaty. He further argued that the method of his expulsion by the Mexican police, in alleged connivance with the F.B.I., violated the treaty by not complying with extradition procedures therein. The court denied these contentions constituted lack of jurisdiction over the subject-matter. Construing the motion as reraising the claim of lack of personal jurisdiction, the court, although considering both waiver and *res adjudicata* applicable, reconsidered the arguments and again rejected the claim of lack of personal jurisdiction as without merit.

Claim against the United States arising out of treaty

In *Falcon Dam Constructors v. U. S.*, 142 F. Supp. 902 (Ct. Cls., July 12, 1956, Madden, J.), the court held that no claim could be made against the United States which arose out of or was dependent on a treaty with foreign nations by virtue of 28 U.S.C., Sec. 1502.

Valuation of requisitioned ship—effect of dispute over title—standards of valuation

The intervening plaintiffs in this case were the private owners of the *Maret* prior to its nationalization by the Estonian Soviet Socialist Republic. In a prior decision, the nationalized steamship company had been held to have no title at the time of requisitioning by the United States on September 16, 1941 (116 F. Supp. 447, December 1, 1953). It was conceded just compensation was due to the intervenors and the controversy was over the proper amount. The court held that sale prices of British flag vessels which were subject to restrictions under British law did not establish market value, which must consider prices in free markets. The court held also that the dispute over title at the time of requisitioning which adversely affected market value at that time did not affect its value to the United States. Accordingly, the court fixed a value between what the vessel was worth to the United States and what the owners could have gotten for it. *Estonian State Cargo & Passenger S.S. Line v. United States*, 139 F. Supp. 762 (Ct. Cls., April 3, 1956, Whitaker, J.).

National defense—detention of Finnish vessels in wartime—lack of equitable grounds for recovery

This is a Congressional reference case under 28 U.S.C. 1492 and 2509 to determine whether there are legal or equitable grounds for compensating the owners of certain Finnish vessels detained by the United States be-

March 18 and November 26, 1918. In previous litigation, the Court of Claims had decided there was no legal basis for the claims. *J. A. Zachariassen & Co. v. U. S.*, 94 Ct. Cl. 315, certiorari denied, 315 U. S. 81. The court held that no new evidence had been produced and that the previous decision was *res adjudicata* as to legal liability, but it could consider whether the plaintiffs had equitable claims. The ground for detention of the vessels was suspicion as to the political reliability of the crews. Although this suspicion was later held to be unfounded, the court held that since reasonable grounds existed for the suspicion under the circumstances, the owners were not equitably entitled to compensation for the detention. The court held further that the purpose of the detention was not to compel the owners to charter them to the United States. In conclusion, the court found no equitable claim in the delay in determination under wartime conditions. *J. A. Zachariassen & Co., et al. v. United States*, 241 F. Supp. 908 (Ct. Cls., June 5, 1956, Littleton, J.).

Sinking by enemy submarine outside of 3-mile limit but over continental shelf—effect of Truman Proclamation

Congressional reference case in which plaintiffs Matson and Union Oil Company of California seek to recover from the United States for loss of two merchant vessels sunk by enemy submarines after Pearl Harbor. Union's vessel was sunk off the coast of California outside the three-mile limit but while over the continental shelf. Union contended *inter alia* that its vessel was "property situated in the United States" within the meaning of Section 5g of the Reconstruction Finance Corporation Act,¹ or within a place "as may be determined by the President to be under the dominion and control of the United States" under said section, on the ground the Truman Proclamation of September 28, 1945,² on the Continental Shelf brought the ship within the quoted statutory language. The court said in part:

Union's contention is not well founded. Vessels on the high seas are not within the United States and while on the high seas are not in a place under the dominion and control of the United States. The Presidential Proclamation specifically stated: "The character and uses of the waters above the continental shelf and the right to take free and unimpeded navigation are in no way thus affected." Whether the Presidential Proclamation was after the *Montebello* was sunk and the terms of the Proclamation indicate it was prospective only.

Matson Navigation Company v. United States, 141 F. Supp. 927 (Ct. Cls., June 5, 1956, Laramore, J.).

AMERICAN CASES ON ENEMY PROPERTY AND TRADING WITH THE ENEMY

Hansen v. Brownell,³ 234 F. 2d 60 (Dist. Col. Ct., May 10, 1956); *Brutcher v. Brownell*, 234 F.2d 692 (Dist. Col. Ct., June 7, 1956); *Dix v. Brownell*,

¹ 48 Stat. 171.

² 49 Stat. 884; 40 A.J.I.L. Supp. 45 (1946).

³ Decision below noted in 50 A.J.I.L. 439 (1956).

141 F.Supp. 789 (E.D.N.Y., May 8, 22, 1956); *In re James' Estate*, 152 N.Y.S. 2d 891 (Surrogate, N.Y. City, June 6, 1956); *Von Opel v. Von Opel*, 154 N.Y.S. 2d 616 (S.Ct., N.Y. City, Aug. 1, 1956); *Brownell v. Union and New Haven Trust Co.*, 124 A.2d 901 (Sup.Ct. Errors, Conn., July 24, 1956).

AMERICAN CASES ON NATIONALITY

Deportation. *Lizos v. Landon*, 235 F.2d 581 (9th Circuit, 1956); *Hiroichi Hamasaki v. Brownell*, 235 F.2d 536 (D.C. Circuit, 1956); *U. S. ex rel. Arramovich v. Lehmann*, 235 F.2d 260 (6th Circuit, 1956); *Rubang v. Boyd*, 235 F.2d 904 (9th Circuit, 1956); *U. S. ex rel. Fong Foo v. Shaughnessy*, 234 F.2d 715 (2nd Circuit, 1956); *U. S. ex rel. Piscione v. Lehmann*, 234 F.2d 811 (6th Circuit, 1956).

Citizenship. *In re Naturalization of Cuozzo*, 235 F.2d 184 (3rd Circuit, 1956); *Ly Sher v. Dulles*, 235 F.2d 606 (9th Circuit, 1956); *Chow Sing v. Brownell*, 235 F.2d 602 (9th Circuit, 1956); *Lew Hsiang v. Brownell*, 234 F.2d 232 (7th Circuit, 1956); *Wong Dick Wing v. Dulles*, 140 F.Supp. 261 (S.D.N.Y., 1956); *Fantony v. Fantony*, 122 A.2d 593 (N.J., 1956); *Tijerina v. Brownell*, 141 F.Supp. 266 (S.D.Tex., 1956).

Expatriation. *Stipa v. Dulles*, 233 F.2d 551 (3rd Circuit, 1956); *Mitsugi Nishikawa v. Dulles*, 235 F.2d 135 (9th Circuit, 1956); *Perez v. Brownell*, 235 F.2d 364 (9th Circuit, 1956); *Scibilia v. Dulles*, 141 F.Supp. 47 (E.D.N.Y., 1956).

Denaturalization. *U. S. v. Chandler*, 142 F.Supp. 557 (D.Md., 1956); *U. S. v. Costello*, 142 F.Supp. 290 (S.D.N.Y., 1956); *U. S. v. Costello*, 142 F. Supp. 325 (S.D.N.Y., 1956).

Naturalization. *Petition of Matura*, 142 F.Supp. 749 (S.D.N.Y., 1956); *In re Petcheff's Petition*, 142 F.Supp. 494 (S.D.N.Y., 1956); *U. S. v. Marasilus*, 142 F.Supp. 697 (W.D.Mich., 1956); *In re Chan Chick Shick's Petition*, 142 F.Supp. 410 (S.D.N.Y., 1956); *Kiviranta v. Brownell*, 141 F.Supp. 425 (D.C., 1956); *Petition of Ferro*, 141 F.Supp. 404 (M.D.Pa., 1956); *In re Fleischmann's Petition*, 141 F.Supp. 292 (S.D.N.Y., 1956); *In re Schulz' Petition*, 121 A.2d 164 (Sup.Ct., Pa., March 13, 1956).

Status of Baltic states—annexation—citizenship

The Minister of the Interior of the Federal Republic of Germany in a letter of August 3, 1951 (Reference 1435 A Ze.12.7), to the International Refugee Organization, Ludwigsburg Office, stated the following attitude of the German Federal Government in connection with the case of the status of citizenship of Mrs. Mathilde Zemgalis:

It is the opinion of the Federal Government that the states of Latvia, Lithuania and Estonia are under military occupation (*occupatio bellico*). The annexation of those states by the USSR has not yet been recognized by the Federal Government . . . Consequently, a change in the citizenship of the population of these states has not taken place and their Latvian citizenship continues to be in force . . .

The German Foreign Office in Bonn, in a letter to the Berlin Senator of Justice of April 29, 1953 (Reference 518-04/II 22020/53V.), made the following statement in connection with the restitution case of *Weinmann v. Republic of Latvia*:

. . . The Federal Republic considers the Republic of Latvia as still existing since neither the former German Reich nor the Federal Republic have recognized the annexation by the Soviet Union. The Western Powers, especially Great Britain and the USA, also are of the opinion that Latvia still exists as a state . . .

NOTE: Other decisions on this subject to the contrary are summarized in 50 A.J.I.L. 441 (1956).

International aviation—Warsaw Convention

The 1929 Warsaw Convention on International Air Transport, 49 Stat. 3000, provides in Article 26 that no action for delay shall lie against the carrier unless complaint is made within 14 days, "save in the case of fraud on his part." In *Air Algérie c. Soc. Fuller Frères*, 1956 Recueils Dalloz et Sirey 372 (France, Cassation, Feb. 22, 1956), the court found a case of "fraud" when fruit was accepted for international air shipment "with the least possible delay," and the plane stopped at Paris overnight for alleged weather reasons, but it was shown that before taking off from Orange one of the pilots had said he "would sleep that night at Paris." In the absence of definition of "fraud" in the convention, the court interpreted it in accordance with French internal law to include any intentionally wrongful act (*tout acte dolosif*).

Treaties in conflict with Constitution—Mexico

In *F. R. Conde v. Secretary of Foreign Relations*, 120 Semanario Judicial 1883 (March 13, 1950), the Mexican Supreme Court ruled that the Mexican Department of Foreign Relations could not hold a car, alleged to be plaintiff's, except on court order. The Department claimed that it was a stolen car brought from the United States, and held pursuant to the Treaty of Oct. 6, 1936, between the United States and Mexico for the Recovery of Stolen Motor Vehicles, 50 Stat. 1333. That treaty provides that on request of the United States Embassy, the Department of Foreign Relations "will use every proper means to bring about the detention of the alleged stolen or embezzled motor vehicles," and, in "the absence of evidence conclusively controverting" proof presented by the Embassy, deliver the car to the Embassy's agent. In view of the guaranty in the Mexican Constitution against deprivation of property and rights without judicial proceedings, the court held that the treaty itself must have meant judicial proceedings when it spoke of "every proper means." If it had purported to permit the executive authorities to hold vehicles without judicial hearings, the treaty would violate the Constitution and thus be of no effect. This was clear, since under Article 113 of the Constitution, "The Constitution, the laws of the Congress . . . and all the treaties which are in accord with the same [Constitution] . . . shall be the Supreme Law of all the Union."

Belligerent occupation—effect of disregard of treaty

In *Cater v. Sutter*, 45 *Revue Critique de Droit International Privé* 479 (1956), the Austrian Supreme Court on July 20, 1955, refused to uphold the validity of title to machinery confiscated during World War II by German authorities in occupation of a part of Yugoslavia annexed *de facto* to Germany. The court held that such "war measures" lacked extraterritorial validity and so would be given no effect in Austria, which had not been a belligerent. Despite the purported wartime annexation, the territory did not become a part of Germany. The court rejected the purchaser's argument that international law, including the Hague Convention on Land Warfare, has obligatory effect only to the extent to which it is respected in fact, and that thus disregard by German authorities of the Hague Convention made it legally inoperative.¹

Export control measures—illegality and enforceability of contract—recognition of Indian law as defense

In *Regazonni v. K. C. Sethia (1944), Ltd.*,² [1956] 1 Lloyd's List L.R. 435 (C.A., April 26, 1956), the Court of Appeal affirmed the decision below and treated the contract for export of goods from India, via Europe, to South Africa, as unenforceable in English courts when both parties knew purpose to violate Indian law, and such law, providing for confiscation and penalties, was not a penal, revenue, confiscatory, or political law in the conflicts sense.

ANGLO-ITALIAN CONCILIATION COMMISSION UNDER PEACE TREATY ¹

Between June 29, 1951, and November 23, 1955, the Anglo-Italian Conciliation Commission, established under Article 83² of the Treaty of Peace with Italy, rendered decisions in 73 cases. The Italian member of the Commission was Antonio Sorrentino, Honorary Section President of the Council of State of Italy. The British member was Colonel G. G. Hannaford, First Secretary of the British Embassy at Rome and Juridical Attaché. In a number of cases, Dr. Plinio Bolla, former president of the Swiss Federal Tribunal, served as the third member. In one case Professor José Caeiro da Matta of Portugal was the third member. It is understood that the decisions of this Commission have not yet been published; they were seen in typed and mimeographed form through the courtesy of an official of the Department of State.

By far the greater proportion of the decisions of the Commission deal briefly with questions of fact and valuation, from which little of general legal interest may be derived. A number merely confirm settlements

¹ See also cases decided by Austrian Supreme Court, Jan. 14, 1953, Feb. 3, 1954, and Sept. 14, 1955, 45 *Revue Critique de Droit International Privé* 258 (1956), concerning effects in Austria of Hungarian and Czechoslovak nationalization decrees.

² Decision below noted in 50 A.J.I.L. 686 (1956).

¹ With the assistance of Wm. W. Bishop, Jr. See digest of decisions of U. S.-Italian Commission, 50 A.J.I.L. 150 (1956). ² 42 A.J.I.L. Supp. 47, 81 (1948).

agreed upon by the claimant and the Italian Government after the case was brought before the Commission, while one or two reject claims for lack of necessary proof. The following opinions appear to be those of most interest from the standpoint of general international law.

Decision No. 1 of June 29, 1951, with Judge Bolla serving as the third member, held in favor of the British claimant company, Courtaulds, Ltd., in a claim concerning the proper exchange rate for payments of wartime dividends on stock owned by claimant in an Italian company. During the war dividends could not be paid to the British stockholder, but were held by Italian agencies. The financial agreement between the United Kingdom and Italy of April 17, 1947,³ provided that Italy should undertake to pay debts due from Italy to persons in the United Kingdom in return for the release of property which the United Kingdom was entitled to hold pursuant to Article 79 of the Peace Treaty. This agreement provided that the rate of exchange to be used in reckoning the amount payable should be that prevailing at the time when the debt became due. Italian efforts to use a later rate of exchange, less favorable to the claimant, were rejected by the Commission.

Case No. 2, decided March 4, 1952, again with Dr. Bolla as the third member, related to a claim for compensation put forward by Mrs. Margaret Grant-Smith for the loss of her British yacht. This yacht was seized August 17, 1943, in a French port and brought to Italy. In 1948 the French Government asked the Italian Government to return the yacht, under the provisions of Article 75 of the Italian Peace Treaty dealing with restitution *in specie* of identifiable property which had been removed from the territory of any of the United Nations to Italy. No trace of the yacht could be found. Thereafter the British Government presented to the Italian Government an application by the owner of the yacht for its return or compensation. The Italian Government replied that since the yacht had been seized in the territory of France, one of the United Nations, only Article 75 was applicable and not Article 78;⁴ Article 75 gave no right to compensation. The Conciliation Commission ruled in favor of the British claimant, pointing out that Article 78 provided that Italy should pay compensation for United Nations property even if it had not been in Italy on June 10, 1940. That date was mentioned in para-

³ Somewhat analogous to the agreements between the United States and Italy of August 14, 1947. *Ibid.* 146 ff.

⁴ Art. 78, par. 1, reads: "In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists."

Par. 4(a) of this article provides: "The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property can not be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. . . ."

graph 1 of Article 78 only with respect to the restoration of legal rights and interests, and not in regard to Italy's obligation in respect to restitution of property. There was no reason for distinguishing between property which had been in Italy on June 10, 1940, and property which came there later, particularly when one recalled that the Italian declaration of war on the Soviet Union and the United States took place in 1941. The Commission stated:

Nor can the inclusion of the words "in Italy", which occurs in the two parts of para. 1 of Art. 78, as also in the title of section I of part VII of the Treaty, be taken to exclude in the following paragraphs the fact that the Treaty puts Italy under an obligation with regard to property, existing originally outside Italy, as such property, having been brought to Italy before the treaty came into force, acquired the character of property "*appartenant en Italie*" to the United Nations or their nationals.

Furthermore, paragraph 9(c) of Article 78⁵ made it clear that this article covered vessels which "after they had been forcibly brought into Italian waters . . . ceased to be at the free disposal in Italy of the United Nations or their nationals, as a result of measures of control taken by the Italian authorities."⁶

In Decision No. 21 of March 13, 1954, on the claim of Percy Currie,⁷ compensation was sought for damage to real property resulting from a 1943 air raid, for damages due to lack of repair to this property while in the hands of the Italian government-appointed sequestrator, and for destruction of a 1938 Fiat car which had been built in 1938 and had gone about 5000 kilometers when sequestered in 1940. The Italian Government contended that it was not responsible for the result of the failure to repair, unless the sequestrator caused damage deliberately or by negligence, and not merely through inability to repair due to wartime conditions. On this point, the Commission found against Italy, saying that Italy was responsible whether the sequestrator was able or unable to make arrangements for the needed repairs:

If the situation was such as to prevent the sequestrator from being able to take in good time the necessary measures to prevent the inclemency of the weather increasing the initial damage caused by the

⁵ Par. 9(c) gave a general definition of "property" as used in the article, and added: "Without prejudice to the generality of the foregoing provisions, the property of the United Nations and their nationals includes all seagoing and river vessels, together with their gear and equipment, which were either owned by United Nations or their nationals, or registered in the territory of one of the United Nations, or sailed under the flag of one of the United Nations and which, after June 10, 1940, while in Italian waters, or after they had been forcibly brought into Italian waters, either were placed under the control of the Italian authorities as enemy property or ceased to be at the free disposal in Italy of the United Nations or their nationals, as a result of measures of control taken by the Italian authorities in relation to the existence of a state of war between members of the United Nations and Germany."

⁶ Decisions 52 through 70, all decided Oct. 24, 1955, deal with the amount of compensation for loss of, or injury to, British yachts in Italian waters.

⁷ Judge Bolla serving as third member.

bombardment, then the Italian Government is responsible for such increase foreseeable and unavoidable just as in the case of initial damage, in accordance with Article 78, paragraph 4, letter (a) of the Peace Treaty. The "loss suffered," according to the terms of this provision, is not only that arising directly and immediately "as a result of injury or damage" but also that arising indirectly and subsequently as a result of the impossibility of arranging for the repairs to be carried out in good time; also in this case the link of causation exists between the "injury or damage" and the "loss suffered" that ceases only from the moment in which it would have been materially possible to take action with a view to preventing a further increase in the loss itself.

If, on the other hand, there was nothing to prevent such action from being taken immediately after the bombardment, the sequestrator is at fault for having failed to do so and the responsibility for the damage caused by delay lies with the Italian Government, in accordance with Article 78, paragraph 4, letter (d).⁸

Part of the compensation sought by claimant was to cover costs of restoring to its normal condition the cellar which had been modified for an air raid shelter, and the attics which had been altered so as to decrease the risk of fire from incendiary bombs. Italy argued that these were not losses "as a result of the war," within the decision of the Franco-Italian Commission in the *Pertusola and Penarroye* case, March 8, 1951. Declining to comment on the case cited, the Commission found that there was no discrimination against United Nations nationals in the matter of these "measures adopted during the war" and hence no liability under Article 78, paragraph 4(d).

The claimant sought the amount necessary to restore the property "to a new and technically up-to-date condition, leaving aside its condition on June 10, 1940." Instead, the Commission awarded "two thirds of the cost required to restore the buildings to the condition in which they would have been at the time of the hand-over if the damages by bombing had not happened, including in those damages the damages caused by the failure to effect the repairs in good time, and if the sequestrator had carried out normal maintenance. If such expenditure were to result in the improvement or increase in value of the buildings (as, for example, by the replacement of the destroyed or damaged sanitary installations by more up-to-date installations), this would justify a reduction equal to two thirds of the excess value, in order to avoid undue profit, which Article 78, paragraph 4, letter (a) of the Peace Treaty certainly did not contemplate." As for the apparent difference in the first two sentences of paragraph 4(a), the Commission said:

True, paragraph 4a of Article 78 makes Italy responsible for the "restoration to complete good order" . . . of the property which is

⁸ Par. 4(d) of Art. 78 reads: "The Italian Government shall grant United Nations nationals an indemnity in lire at the same rate as provided in sub-paragraph (a) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Italian property. This sub-paragraph does not apply to a loss of profit."

returned to citizens of the United Nations, in accordance with paragraph 1 of the Article.

But this initial affirmation must be connected with the second sentence of paragraph 4a, and with paragraph 4d, which impose upon the Italian Government the obligation to make good only up to a limit of two thirds the losses sustained "as a result of injury or damage arising out of the application of discriminatory measures." It cannot be admitted that the initial sentence of paragraph 4a was meant to lay down a liability and a full liability, on the part of Italy in respect of damages different from those contemplated under the said two special provisions, and particularly in respect of damage arising out of the passage of time and out of normal wear and tear during the war; as, in the latter hypothesis, the reasons for a limitation to two thirds would be far more cogent than in the qualified cases contemplated in the second sentence of paragraph 4, letter (a) and in paragraph 4(d). The first sentence of paragraph 4, letter (a) can therefore only mean

where the special conditions mentioned in the second sentence of paragraph 4a or in paragraph 4d do not occur, the restitution of the property must be made in complete good order, i.e. as though arrangements for its normal maintenance had been made during the period in which the owner was dispossessed of it—

where the special conditions mentioned in the second sentence of paragraph 4a or in paragraph 4d do occur, the compensation of two thirds shall be calculated by taking into account that the property would have had to be restored, if restitution had been possible, to complete good order, i.e., as though arrangements for normal maintenance had been made during the period in which the owner had been dispossessed of it.

Finally, with respect to the car, which had been reduced to scrap, the Commission rejected the Italian contention that the compensation should be two thirds of the value of a 1938 Fiat, and instead pointed out that the treaty required "not compensation equal to two thirds of what would have been the value of the returned property (if restitution had been possible), but two thirds of the sum necessary at the date of payment, to purchase an equivalent article." This meant two thirds of the price of a two-year-old Fiat of kind most similar to the 1938 car in question, which had run about 5000 kilometers.⁹

In Decision No. 22, of May 3, 1954, the Commission, Professor da Matta of Portugal serving as the third member, ruled by majority vote in favor of the Italian contention that it lacked competence to give a general opinion on the abstract question whether natural persons possessing British nationality on the requisite dates should have the right to present claims,

⁹ In the Josiah Gibson claim, Decision No. 6, the Commission on April 14, 1953, rejected that part of a claim presented to cover loss of good will of a commercial business which came to an end when a British national doing business in Naples was interned in a concentration camp. Apart from the abstract question of compensability of the loss of good will, the Commission found that "it is certain that the damage is not adduced as a direct consequence of a specific event of war or of measures adopted in respect of Mr. Gibson's property; and therefore the liability of the Italian Government does not exist, either under para. 4 a) or under para. 4 d) of Article 78 of the Peace Treaty."

even though they also possessed Italian nationality. The British Government contended that such persons were entitled to claim under the treaty by reason of its specific language. Though the Italian Government replied that the Commission could not give any opinion on such a question except in a specific case, the British relied on the broad language of Article 83, paragraph 2.¹⁰ In holding for the Italian contention, the Commission pointed to the need to interpret the treaty in accordance with general rules of interpretation. To determine the meaning of the treaty, one "must, as an essential element . . . have recourse to the determination of the *ratio legis* of the Treaty." The Commission said:

. . . After all it is always a question of a jurisdictional function. . . . Despite the designation of Conciliation Commissions (which is acceptable when it is a question of the settlement of a dispute between a representative of the Government of the United Nation concerned and a representative of the Italian Government, being able to settle the disputes amicably), they are in cases like the present one, real arbitral tribunals. Affirmation which is more than ever evident in the case of the addition of a Third Member, when according to paragraph 6 of Article 83, the decision of the majority of the members of the Commission shall be the decision of the Commission and accepted by the Parties as definitive and binding. Which means that its mission is not to decide along the lines of what it considers just and equitable but to determine the disputes according to the strict rules of law. . . .

The Conciliation Commission judges: it is not given to it to exceed the limits which the Peace Treaty assigns formally to its jurisdiction.

If it is a question therefore, without any shadow of doubt, of the exercise of a jurisdictional function (an authentic interpretation would demand, as definition, the agreement of all the contracting parties), the authors (denying unanimously the admissibility of an unilateral interpretation, in the sense that they exclude the possibility of forcing one of the parties to accept an interpretation adopted by the other party) if it is the case, it is repeated, of a jurisdictional function, one can only conclude that the Commission must limit its activities to determining the disputes arising from claims presented according to the terms of Article 78 of the Peace Treaty, the understanding of jurisdiction being the same in international and internal law. One cannot exceed the limits which the principles, the text and the spirit assign to the competence of the Commission. An interpretation according to which the Commission would also have the faculty to interpret the provisions of the Peace Treaty in an abstract and general manner, with obligatory effect for all future cases, would run the risk, because it is abusive, of ending in a judgment blemished by

¹⁰ Art. 83, par. 1, provides for establishment of a Conciliation Commission to deal with "any disputes which may arise in giving effect to" specified articles of the Treaty. Par. 2 adds: "When any Conciliation Commission is established under paragraph 1 above, it shall have jurisdiction over all disputes which may thereafter arise between the United Nations concerned and Italy in the application or interpretation of Articles 75 and 78 and Annexes XIV, XV, XVI, and XVII, part B, of the present Treaty, and shall perform the functions attributed to it by those provisions." Par. 6 provides: "The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding."

excess of power (it would create rules of law, which is not a jurisdictional function, but a legislative function), a very serious position in our case precisely because, according to the provision of paragraph 6 of Article 83 of the Peace Treaty, the decision is considered as definitive and binding.

Even though the treaty did not specifically limit the competence of the Conciliation Commissions to concrete cases, it could only by express language have given the Commission "a jurisdiction which is not that which is generally attributed to Conciliation Commissions, and which does not come within their normal function." The Commission added:

There is no word in the Peace Treaty which can lead to the conclusion that the interpretation of a provision by a consultative opinion, comes within the function of the Conciliation Commission. . . . There is no indication of the acceptance of this doctrine in the cases—and they are very numerous—submitted to the consideration of the Arbitral Tribunals or of the Conciliation Commission. On the contrary, a Conciliation Commission would not know how to issue the requested opinion without infringing the well established principle of international law according to which all judiciary procedure arising from a juridical question pending between States, calls for the consent of these States.

The Commission concluded by pointing out that the provision empowering the Commission to determine its own *procedure* did not affect *jurisdiction*, and said:

International Jurisprudence normally interprets the provisions of international treaties in a restrictive manner, as it considers them as limitations of the sovereignty of the State, by the application of the principle which submits to a restrictive interpretation the clauses which derogate from common law.

Dissenting, the British member referred to the use of "test cases" and said that:

. . . without violating the acknowledged principles, nor any of the accepted rules of international law, an interpretation of the status of persons possessing dual nationality given in relation to the provisions of the Peace Treaty "even in advance of a concrete case" could only help the cause of justice, without compromising the rights of the defendant state, and would in my opinion conform perfectly with the spirit and the letter of article 83 of the said Treaty.

BOOK REVIEWS AND NOTES

Mezhdunarodnoe Pravo [International Law]. By V. I. Lisovsky. Kiev: Kiev State University, 1955. pp. 477. Appendix. 21 Rubles.

Appearance of the first general textbook on international law since Stalin's death is something of an event in the U.S.S.R. It is remarkable that it comes from the pen of a relatively unknown scholar and from Kiev rather than Moscow. If it can be accepted as representative of the post-Stalin line, it indicates that there has been little change of direction in international law as viewed by Soviet scholars since the beginning of the Khrushchev policy of moderation. The spirit of Vyshinsky's oratory still haunts the pages of this book in such passages as:

The Imperialist bloc conducts a struggle against the sovereignty of other states, uses its diplomatic and consular apparatus for espionage and to direct the underground in the Peoples' Democracies and in the U.S.S.R., rudely breaks international treaties, builds aggressive blocs of various types using them to conduct a reactionary policy against the U.S.S.R. and the countries of the Peoples' Democracies.

Kelsen, Verdross, Pitman Potter, Scelle and Lauterpacht are described as "minstrels of the American imperialists," while Clyde Eagleton, James Brown Scott, Parry and Spykman are said to have borrowed the arguments and ideas of the German Fascists and to be trying to create a world state dominated by the U.S.A. The International Law Commission is presented as the arena of struggle between the camp of peace and democracy, led by the U.S.S.R., and the camp of war and lawlessness, led by the U.S.A.

Most of the positions on specific issues are familiar to those who have followed earlier Soviet literature. For example, treaties are still heralded as the principal source of international law, but the author presents a surprise in saying that decisions of international organizations are today a source of law even for states not taking part directly in their adoption. One wonders whether this view would be held if the U.S.S.R. did not participate, and how it squares with the Soviet objection to the Security Council's decision to enter the Korean conflict after the Soviet "walk-out." There is no frank statement such as has appeared in an earlier text by Judge Kozhevnikov to the effect that the U.S.S.R. will pick and choose the norms it wishes to accept from the present body of international law, but this is the implication of the Ukrainian author. He says that *pacta sunt servanda* is supported as a principle of international law not because it is a juridical norm, but only because it is a logical premise for all co-ordination of law generally. The maxim will not require support of an "unequal" treaty, nor of one violating international law. There is no suggestion that an international court should determine inequality or illegality.

Theoretical problems are touched upon only lightly in contrast to their treatment in previous works by Korovin and Kozhevnikov. There is no

discussion of the question whether international law is bourgeois or socialist in character or an amalgam, or whether a new socialist international law is being born. The author sidesteps the whole philosophical argument of previous years as to whether form and content are indivisible, for he states, without any argument:

In analyzing norms of international law one must distinguish the form from the substance of each norm.

The Suez issue is anticipated by a section in which the author states that American monopolists bought the Vatican's shares in the Canal Company in 1948 so as to be able to participate as shareholders in the affairs of the Canal. He proceeds to argue that American monopolies are trying to establish their control over the Suez Canal and to transform it into their base. The earth satellite issue is not treated at all, but in his discussion of airspace the author makes no claim to jurisdiction beyond a 75-kilometer limit.

The United Nations Charter and the Statute of the International Court of Justice are printed in the Appendix, together with a bibliography of pre-revolutionary and Soviet works. This bibliography is selective. It omits Korovin's much discussed early work, *International Law of the Transitional Period*, and it includes nothing by Eugene B. Pashukanis. The latter was declared an enemy of the people in 1937 and denounced in part for his work in international law. Pashukanis' restoration to favor posthumously in September, 1956, may bring a return of his works to Soviet bibliographies and a return of his idea that international law is bourgeois in form, but useful to Soviet socialism and therefore to be supported. The trend in this direction may have begun, if we are to believe reports that Judge Kozhevnikov told an audience of Japanese professors in August, 1956, that he had withdrawn from his earlier view that a socialist international law was in process of development.

JOHN N. HAZARD

Die Sowjetische Zwölfmeilenzone in der Ostsee und die Freiheit des Meeres.

By Hans-Albert Reinkemeyer. (Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht. Beiträge zum Ausländischen Öffentlichen Recht und Völkerrecht, Heft 30.) Cologne and Berlin: Carl Heymanns Verlag, 1955. pp. 175. Appendix. DM. 24.50.

In this timely and competent study, the author analyzes and criticizes the Soviet claim to a 12-mile zone of territorial waters in the Baltic Sea. He reaches the conclusion that the claim is unfounded in international law. Although in his opinion there is no principle of general international law prescribing a uniform width of territorial waters, a state is not free to extend its sovereignty to waters beyond the limits previously established in the region concerned. To be valid, such an extension must be recognized by other states. In the Baltic, the generally recognized width of the territorial sea is 3 or 4 miles. In 1909, Russia introduced a 12-mile customs zone, but this was not a claim of sovereignty. During the Soviet period,

until World War II, Russian territorial waters in the Gulf of Finland—the only part of the Baltic then adjacent to Russian territory—were defined by a treaty with Finland as extending four miles from the coast. The Soviet ordinance of 1927, establishing generally a 12-mile zone, was by its own terms not applicable to waters the limits of which were governed by a treaty. It was only after the incorporation of the Baltic states during World War II that the Soviet Union began to claim a 12-mile zone in the Baltic. Since Sweden and Denmark have protested this claim,¹ and the German Federal Republic has maintained silence, the claim cannot be regarded as recognized. Furthermore, in the author's opinion, "security" is not a sufficient ground for an extension of territorial waters in these circumstances.

In the course of his study the author reviews concisely and skillfully such diverse matters as the general Soviet attitude toward international law, the development and the present state of the law of territorial waters and contiguous zones, the legal nature of Soviet claims, the meaning of the freedom of the seas, the continental shelf doctrine, the history of the attempts to treat the Baltic as a "closed sea," and the evolution of the position of Russia and other Baltic countries with respect to the width of territorial waters. Not in consonance with the practice of some nations, including the United States, is the author's apparent opinion that zones forbidden to merchant vessels may not be established in territorial waters (p. 37). An appendix contains excerpts from Soviet legislation and from the diplomatic correspondence between Sweden and the Soviet Union in 1951.

The book is essentially an able presentation and defense of a position very similar to that of the Scandinavian states with respect to the width of territorial waters in the Baltic and elsewhere. It is instructive to compare and contrast it with the Soviet position as presented by A. N. Nikolayev in a volume which apparently was not available to Mr. Reinke-meyer.²

OLIVER J. LISSITZYN

The Concept of War in Contemporary History and International Law.

By Lothar Kotsch. (No. XVII, Etudes d'Histoire Economique, Politique et Social.) Geneva: Librairie E. Droz, 1956. pp. 311. Bibliography.

The book "starts from the premise that *de facto* war, *i.e.*, war in the material sense, has been accorded its own status in international law" (p. 17); it concludes that the transposition of the social phenomenon "war" into international law "has been expressed by the broadening of the state-of-war concept into a concept of war in the formal and material senses" (p. 297). The traditional state-of-war doctrine of the nineteenth century distinguished between war in the sense of international law and sociological *de facto* war, called reprisal, intervention or police action;

¹ See note by Gene Glenn on the Swedish-Soviet controversy, 50 A.J.I.L. 942 (1956).

² See review in 49 A.J.I.L. 592 (1955).

the latter was not conceived as related to application of the laws of war. The recognition of material war in the province of international law has profoundly altered the legal approach to the concept of war, which can no longer be considered *in abstracto* because application of certain fundamental laws of warfare have become independent of the consent of the belligerents. The dichotomy, war and measures short of war, has now become a trichotomy; formal war, material war, and armed force short of war; the last of these does not produce application of the rules of warfare. Finally, the attempt of erudite writers to confer arbitrary power on the United Nations Forces as to the application of the laws of war "in wars of sanction" bitterly failed, and the United Nations has rediscovered the utility and legal advantages of neutrality. The legal consequences of this differentiation were not made apparent for this reviewer.

The book is a mine of information; it covers a wide range of topics and reflects wide reading; it brings in many cases and much information concerning the legal treatment of recent conflicts. It is well organized and gives thorough documentation. To anyone interested in the legal status of war, Mr. Kotzsch's book should be very useful.

CLYDE EAGLETON

China and Soviet Russia. By Henry Wei. Princeton, N. J.: D. Van Nostrand Company, Inc., 1956. pp. xvi, 379. Index. \$7.50.

In this book there is presented an account not only of Chinese-Soviet Russian relations (which date only from 1917) but, briefly, of Russo-Chinese relations during the short period between the Chinese Revolution (1911) and the Russian Revolution (1917) and, extensively, of action and reaction in the Far East and in Europe and in the United States, with the Soviet Union in the middle position, China and Japan on the Eastern end, and Germany, Great Britain, France and the United States on the Western end.

The author is a Chinese. He has lived in the United States long enough to have become thoroughly familiar with American ways, methods and processes—in academic and in other contexts. He is one of the many who have had graduate training in the field of international relations under Professor Quincy Wright at the University of Chicago.

In the introduction, Professor Wright quotes from an address by Dr. Hu Shih wherein that truly learned and thoughtful scholar and diplomatist declared six years ago that "China's woe began . . . when she was invited by the United States Government to sign the Declaration of the United Nations. . . ." That statement referred, of course, as is shown in the context, to a woe which has befallen China—and the United States—during recent years. But for the seed and the soil whence has come this woe one must look back to the moment when, at the end of the fifteenth century, the Russians crossed the Urals eastward, and to the later but still long-ago moment when, in their conquering advance toward the Pacific, Russian forces began encroaching upon and seizing parts of the far-flung and amorphous domain of a state and rulers, China and the

Manchus, who were not prepared effectively to resist. However, in this book, Dr. Wei is dealing not with Tzarist Russia's relations with the Chinese Empire but with Soviet Russia's relations with the Republic of China.

Speaking of the book itself, Dr. Wright poses several questions and affirms that Dr. Wei tells *how* things have happened rather than *why*, "lets the facts tell the story." Dr. Wei, in his Preface, also poses several questions and declares: "This book endeavors to answer these questions" and "The viewpoints expressed in this work are governed by the data presented. These data are culled from a large variety of published sources." (The extent and the character of these sources are indicated in the footnote references and in a well-ordered working bibliography.)

In the text, Dr. Wei has achieved a comprehensive setting forth and tying together of essential facts, with an adherence to chronological sequence and an objectivity as regards deductive interpretation which render the book as a whole a real contribution—reliable, readable and concise—toward knowledge and understanding of the policies, decisions, operations and eventuations whence have come the situation which now prevails in Soviet-Chinese relations, and of the problems with which the world is confronted by virtue of those developments.

Most useful for the purposes of the general reader—and in some respects those of the specialist—are Professor Wright's "Introduction," the author's "Preface" and the author's "Summation and Interpretation" (Chapter 15). Most valuable for particular purposes of the specialist are those chapters which deal with "China's Accusation of the USSR in the United Nations" (Chapter 12) and with "The New Sino-Soviet Treaty and Agreements" (Chapter 13). Probably most interesting and instructive for American readers are the passages *passim* and the whole of Chapters 10 and 11 which collectively tell the story of how it came about that in China the Nationalists were defeated, the Communists were victorious and the United States now has in the Far East a new, powerful and bitter enemy. Probably most replete with information new to Western readers is Chapter 14 which deals with "Sino-Soviet Friendship and Cooperation."

A few "errors of imprecision" may be regarded as adjectival rather than seriously substantive. For example: A statement that in April of 1927 Chiang Kai-Shek "started his drastic campaign against Communists" (p. ix) should, for perspective, be preceded by mention of what the Communists had first done against Chiang. The statement that at Nanking in that same year "British and American warships resorted to direct intervention and opened a barrage of gunfire on the city" (p. 66) is a reiteration of a long popular but distorted account: the simple facts are that a lawless unit of Chinese troops had entered Nanking and had killed several "foreigners"; the remaining foreigners—men, women and children—had taken refuge in a compound on a hilltop inside the city and near to a segment of its wall; some of the troops were about to assault the compound; the warships (destroyers) under reference laid down a barrage not of "gunfire on the city" but of *pinpointed protective shelling around*

the beleaguered compound. Better than to say, after mentioning Pearl Harbor, that "Soon afterwards the United States declared war on Japan," would be to say that Japan declared war and the United States replied with a declaration that there existed between it and Japan a "state of war."

Among matters of which, in view of the wide range of the data presented, there might have been but apparently is no mention are: The account given by Mr. Byrnes of the drafting by him and Mr. Cohen, the signing by President Truman, and delivery to the Soviet authorities of a formal invitation to the Soviet Union to enter the war against Japan; and the accounts variously given of the long withholding by the Soviet Government from its allies of information regarding the approaches made to it by the Japanese on the subject of negotiating toward bringing the war to an end. On the whole, though, there seems to be little of any consequence that the author has not mentioned in one way or another in the course of his full but concise narration.

There are appended texts or parts of texts of documents chosen with unusually discriminatory respect for the principle of pertinency and real usefulness in relation to what precedes. And there is—as there should be with every such book but all too often is not—a good index.

STANLEY K. HORNBECK

How Communists Negotiate. By C. Turner Joy. With a Foreword by General Matthew B. Ridgway, U.S.A. (ret.). New York: Macmillan Co., 1955. pp. xiv, 178. \$3.50.

The United States in World Affairs 1953. Edited by Richard P. Stebbins, with the assistance of Grant S. McClellan. Introduction by Grayson Kirk. (Published for the Council on Foreign Relations.) New York: Harper & Brothers, 1955. pp. xii, 512. Index. \$5.00.

As Senior Delegate and Chief of the United Nations Command Delegation at Panmunjon, the late Admiral Joy had ample opportunity to observe Communist negotiation techniques. He describes them graphically in this small volume. According to his report, Communist negotiators pay much attention to the stage setting, with due regard, for instance, for maintaining face. They are selected carefully, with force of intellect the primary consideration, and reputation, rank, and position a secondary consideration. They "seek an agenda composed of *conclusions* favorable to their basic objective and create 'incidents' calculated to provide them with negotiating advantages and propaganda" opportunities (p. 30). Their delaying techniques are assisted by the American concern for human suffering. Wearying tactics include the endless repetition of demands. The negotiators strive to reduce the effectiveness of armistice provisions for supervision and investigation and seek to secure a veto over all enforcement action. Spurious issues are introduced and used as bargaining points. Truth is denied or distorted. Western concessions are regarded as a sign of weakness and invite pressure for more. Agreements that have been reached are denied without embarrassment.

Admiral Joy learned these lessons from bitter personal experience. But since Communist negotiation tactics are nothing new in the experience of American generals—for instance, in Berlin and Vienna—one wonders why he was not briefed on their peculiarities and warned in advance on what to expect.

Admiral Joy's quarrel, however, is not only with the Communist negotiators in Korea. He is also very critical of "Washington" (which may be a reason why Senator William E. Jenner "encouraged" him to write this book (p. viii))—its directives, mistakes, and especially "the failure to take punitive action against Red China" and the "restraints imposed upon the United Nations Command forces in Korea . . . [which] were not allowed to attack the enemy in the most effective manner nor with the most effective weapons" (pp. 163–165). As Admiral Joy saw it:

It seemed to us that the United States Government did not know exactly what its political objectives in Korea were or should be. As a result, the United Nations Command delegation was constantly looking over its shoulders, fearing a new directive from afar which would require action inconsistent with that currently being taken. . . . The principal reasons for seeking an armistice in Korea when and how we did will not bear critical examination. (pp. 173–175.)

The author also discusses the prisoner-of-war issue on which he disagreed strongly with the United Nations Command. In his view, insisting on "voluntary repatriation cost us over a year of war, and cost our United Nations Command prisoners in Communist camps a year of captivity. The United Nations Command suffered at least 50,000 casualties in the continuing Korea war. . ." (p. 152). And he adds: "Whatever temporary loss of prestige in Asia Communism suffered from the results of 'voluntary repatriation' has long since been overtaken by Communism's subsequent victory in that area" (*ibid.*). He also feels that the Communists had some sound reason on their side when they "contended that the United Nations Command had no right to withhold repatriation of certain prisoners of war merely because these prisoners expressed opposition to being repatriated" (pp. 146–147).

Admiral Joy's anti-"Washington" story must be respected for its forthrightness. It must also be examined carefully when the documents become available, so that we may have a well-rounded picture of the Korea Armistice situation. At least in part, it is still shrouded in mist. Some of the latter may have originated in Foggy Bottom, but, it would appear, it also came from both ends of Pennsylvania Avenue and from America's restless Main Street as it approached and entered a presidential election year.

In the 1953 volume of this standard annual résumé of the United States in world affairs, Mr. Stebbins deals in his lucid and objective way with the manifold events of the year which saw new men taking over both in the White House and the Kremlin, the end of the Korean War, the ouster of Mossadegh, the execution of Beria, the June 17 revolt in East Berlin, and Adenauer's election triumph, as well as many other events and develop-

ments. There was also the inability of the West to arrive at a unified policy toward Communist China. At home it witnessed the "clean-up" of the State Department and Foreign Service, the McCarthy attacks on the United States information program in foreign countries, and the struggle over the Bricker Amendment.

The appended Chronicle of World Events and Selected Bibliography are welcome, as is the careful documentation.

JOHN BROWN MASON

Principes de Droit International Privé Applicables aux Actes Accomplis et aux Faits Commis à Bord d'un Aéronef. By Flavio de Planta. Geneva: Librairie E. Droz, 1955. pp. 188.

A transaction or an event with possible legal consequences takes place on board an aircraft. For choice-of-law purposes in private law, in what country should it be deemed to occur? This, in the broadest terms, is the problem to which Doctor de Planta addresses himself. Since there are but few statutory provisions and virtually no decided cases in point, the problem is discussed very largely in terms of principle and policy, with special reference to Swiss law. The main conclusions are as follows: (1) A transaction or event which occurs in an aircraft on the ground within the territory of a country should be deemed to take place in that country; (2) with respect to aircraft in flight, the prevalent rule of positive law is that the transaction or event is deemed to take place in the country over which the aircraft is flying at the moment of the occurrence; but, in view of the increasing speed of flight and the consequent difficulty of determining the precise location of the aircraft at a particular time, the preferable rule, already incorporated in the legislation of a few states, is to regard the transaction or event as occurring in the country of the nationality of the aircraft. The author argues his position well, but fails to note the difficulty to which the solution proposed by him may give rise in the case of an aircraft having the nationality of a federal state (such as the United States or Canada) composed of entities with different private law systems. He seems to assume, moreover, that it is desirable to have a rigid rule, with no discretion left to the court to consider other factors. At the end of the book, the author appends, as an example of concrete application, a discussion of the effect of birth on board an aircraft on the nationality of the child. To an Anglo-American lawyer, who normally regards nationality as a matter of public rather than private law, the example seems ill chosen. It is typical of the tendency of the author to ignore Anglo-American concepts and ways of thought. There is no mention, furthermore, of the possibility of dual nationality and of the application for certain purposes of the principle of effective nationality. Despite these and other limitations, the book merits the attention of all those who are interested in air law or in private international law.

OLIVER J. LISSITZYN

Constitutions of Nations. (2nd ed.) 3 vols. By Amos J. Peaslee. The Hague: Martinus Nijhoff, 1956. Vol. I: pp. xxvii, 896; Vol. II: pp. xii, 881; Vol. III: pp. xii, 919. Index. \$22.50.

International Governmental Organizations. 2 vols. By Amos J. Peaslee. The Hague: Martinus Nijhoff, 1956. pp. 1564. \$15.00.

The sets of books listed above grew out of the summer week-end visit in 1946 of a group of thinkers in the international law field to the summer home of Ambassador Amos J. Peaslee at Mantoloking, New Jersey. The group of visitors included Ralph G. Albrecht, George Agnew Chamberlain, Frederic R. Coudert, Willard B. Cowles, Wadsworth Cresse, Jr., John Erskine, George A. Finch, Christopher B. Garnett, John N. Hazard, Martin Hill, Manley O. Hudson, Wilfred Jenks, Alfred D. Lindley, Harold H. Martin, John J. McCloy, Gerald J. McMahon, John W. Nason, Harold E. Stassen, Dorothy Stratton, Edgar Turlington, William Roy Vallance, Sarah Wambaugh, and Thomas Raeburn White.

Ambassador Peaslee is presently Deputy to Governor Harold E. Stassen, the Assistant to the President, for disarmament matters. He was formerly Ambassador of the United States of America to Australia. He is a well-known expert on international law, having been in the field since World War I.

These two sets of volumes constitute important sources of materials for the future development of international law—especially the development of international law looking toward the peaceful settlement of international problems.

The set, *Constitutions of Nations*, contains the basic constitutional writings of some 89 nations. This is the second edition, the first having been published ten years ago. This edition contains the present constitutions of those many nations which underwent domination, liberation or upheaval following the close of World War II.

The set, *International Governmental Organizations*, contains, for the first time, a compilation of the constitutional papers of some 119 international organizations. These latter papers include not only the basic charters of the international agencies, but also such important documents as the agreements between the agencies and the United Nations. The completeness of this set is marred by the absence of the Statute of the International Atomic Energy Agency, which was not put into final form and signed until October 26, 1956, after this set had been printed.

It is indeed fortunate that these two collections have appeared at a time when there is so much interest in the peaceful solution of international difficulties. The *Constitutions of Nations* provides the basic materials for seeing that international problems are resolved to the greatest extent practicable within the normal legal procedures of the nations involved. Thus, when the new International Atomic Energy Agency has to consider the legal techniques to implement its inspection and control systems, this set will supply invaluable source materials for finding the techniques which will be common to the greatest number of nations, and for helping deter-

mine the variations required to fit these legal techniques into the legal system of the nation with least possible disruption. Indeed, a judicious use of the information in these volumes might go far to eliminate the fear of many nations that the new agency will unduly interfere with the "sovereign rights" of the nations.

The *International Governmental Organizations* will be of great interest to that growing group of persons, both in government and in business, who have to deal with international agencies. It will also be of importance to those closely connected with the establishment of new international agencies, since it contains guideposts to many ideas already in use.

Both collections represent a wealth of meticulous detailed work in finding, translating, printing, checking and analyzing the important documents. Altogether the 5 volumes constitute 4260 pages of precise collation. Both sets of papers follow the same format. There is an introduction by Ambassador Peaslee giving, in quantitative terms, summaries of the various provisions. In the set of *Constitutions of Nations*, for instance, attention is given to the number of different sources of power to enter into the constitutional document. The body of each set consists of the basic documents (in English) of the nations or international organizations in the alphabetical order of their names. Each set of documents is immediately preceded by a summary of the important provisions and is followed by a helpful bibliography of publications discussing the constitutional documents. However, *Constitutions of Nations* has one additional feature: Ambassador Peaslee has carefully analyzed the important provisions of the various constitutions in tabular form for very easy study and comparison. This is an extremely painstaking analysis in very readily understandable form. Particular attention is also given to the number and kinds of clauses guaranteeing human rights.

GEORGE NORRIS, JR.

Das Bonner Grundgesetz. By Hermann von Mangoldt. Second revised edition by Friedrich Klein. Part I. Berlin and Frankfurt/Main: Verlag Franz Vahlen, 1955. pp. xii, 352. DM. 24.00.

Völkerrechtliche und Staatsrechtliche Abhandlungen. Carl Bilfinger gewidmet zum 75. Geburtstag am 21. Januar 1954. By Georg Schreiber and Hermann Mosler. (Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht. Beiträge zum Ausländischen Öffentlichen Recht und Völkerrecht, Heft 29.) Cologne and Berlin: Carl Heymanns Verlag, 1954. pp. viii, 557.

A standard work on constitutional law in the German Federal Republic by the late Professor Hermann von Mangoldt is being revised by the well-known jurist, Professor Friedrich Klein of the University of Münster. Its Part I—three more parts will be published later—discusses the historical background of the Bonn Basic Law, the principles and problems of its interpretation, and its relations to Allied Occupation Law (pp. 12-16, 140-144). In the examination of its structure and style, the author refers

with apparent approval to another writer's characterization of the Bismarck Constitution of 1871 as a "diplomatic document," the Weimar Constitution of 1919 as a "combination of popular catechism and constitutional law," and the Bonn Basic Law of 1949 as a "piece of artful juristic architecture." Though the result of the "industrious efforts of lawyers" (p. 17), the document is not free from stylistic flaws, grammatical faults, textual awkwardness, and passages difficult to fathom. It has also been criticized repeatedly for its tendency to "regulate" too many different things instead of leaving them to constitutional development. The larger part of the book, however, is devoted to what has been called the "showpiece" of the Constitution—its Articles 1 to 11 dealing with the Basic Rights (and duties) of German citizens. Professor Klein deals with the subject at great length (pp. 51–352), with scholarly competence and careful documentation. However, only a few non-German authors are cited—none at all on Occupation Law, which certainly has been examined carefully by scholars in several countries. A similar comment can be made on the sections on Human Rights (pp. 55–56, 97–100, 155–158), where, for instance, "E. H. Carr, Benedetto Croce, Mahatma Gandhi, Harold J. Laski, S. de Madariaga, Jacques Maritain [and] Quincy Wright" (p. 57) are referred to without specific mention of any of their pertinent writings, except for one article.

Article 25 of the Bonn Constitution which deals with the status of international law in the Federal Republic will be included in a forthcoming Part of this book (p. 144).

The nineteen contributions in the *Festschrift* for the Director of the Max Planck (formerly Kaiser Wilhelm) Institute for Public Foreign and International Law during ten post-World War II years, reflect Professor Bilfinger's lifetime interests in the fields of federalism, law and politics, and international law. They fall into the same categories. Topically, they range from questions of "Self-Government Rights of Local Communities" (Karl Joseph Partsch) under the Bonn Constitution and "International Relations between Universities in the Later Middle Ages" (Anneliese Maier), to "The Expulsion [of foreigners] from the Federal Republic" (Walter Jellinek), "Historical Plans for European Constitutions" (Ellinor von Puttkammer), "Foreign Policy Determination in the Constitutional System of the Federal Republic" (Hermann Mosler), "Church Law and Church History" with special reference to international law (Georg Schreiber), "The Duty of the Federal Government to Keep the Bundesrat Informed" on the conduct of national affairs (Adolf Schüle), to "Historical Research and Thinking in International Law" (Arthur Wegner), "What Is Positive International Law?" (Helmut Strebel), "The Status of non-Members of the United Nations" (Ulrich Scheuner), "The International Status of Jerusalem" (Günther Weiss), comments on "The Draft of a Treaty on the Constitution of the European Community" (Hans-Joachim von Merkatz), "The Struggle over the Bricker Amendment" (Erich Kraske), and others. These articles testify to the wide range of scholarly interests among the members and friends of the famous

Institute founded by Viktor Bruns, and are in line with its international standing. Many readers will be especially interested in the article "Documentation and Scholarship" (Erich Pietsch), which deals with the ever increasing difficulty of keeping up with new publications, with the implied danger of having to look up so many references that time gets short for the actual writing. The author has specialized for some time in examining the future possibilities of applying mechanized methods to research. Tens of thousands of new books and 3,000,000 articles in 30,000 professional journals each year are hard to cope with. Judging by the silence of the writer on this point, research in international law and relations seems to be less subject to mechanical progress than chemistry, which is endowed with larger funds anyway.

JOHN BROWN MASON

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* Mention here neither assures nor precludes later review.

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UNITED NATIONS

REPORT OF THE INTERNATIONAL LAW COMMISSION

COVERING THE WORK OF ITS EIGHTH SESSION, APRIL 23-JULY 4, 1956 *

CHAPTER I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with the statute of the Commission annexed thereto, held its eighth session at the European Office of the United Nations, Geneva, Switzerland, from 23 April to 4 July 1956. The work of the Commission during the session is related in the present report. Chapter II of the report contains the Commission's final report on the law of the sea, as requested in General Assembly resolution 899 (IX), Chapter III consists of progress reports on the work on the subjects of Law of treaties, State responsibility and Consular intercourse and immunities, while Chapter IV deals with questions relating to the statute of the Commission and with administrative matters.

I. MEMBERSHIP AND ATTENDANCE

2. The Commission consists of the following members, which [*sic*] were all present at the session:

<i>Name</i>	<i>Nationality</i>
Mr. Gilberto Amado	Brazil
Mr. Douglas L. Edmonds	United States of America
Sir Gerald Fitzmaurice	United Kingdom of Great Britain and Northern Ireland
Mr. J. P. A. François	Netherlands
Mr. F. V. García Amador	Cuba
Mr. Shuhsi Hsu	China
Faris Bey el-Khoury	Syria

* U.N. General Assembly, 11th Sess., Official Records, Supp. No. 9 (A/3159). For reports of the International Law Commission covering its preceding seven sessions, see Supplements to this JOURNAL, Vol. 44 (1950), pp. 1, 105 (1st and 2nd Sess.); Vol. 45 (1951), p. 103 (3rd Sess.); Vol. 47 (1953), p. 1 (4th Sess.); Vol. 48 (1954), p. 1 (5th Sess.); Vol. 49 (1955), p. 1 (6th Sess.); and Official Documents, Vol. 50 (1956), p. 190 (7th Sess.).

<i>Name</i>	<i>Nationality</i>
Mr. S. B. Krylov	Union of Soviet Socialist Republics
Mr. L. Padilla-Nervo	Mexico
Mr. Radhabinod Pal	India
Mr. Carlos Salamañca	Bolivia
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Jean Spiropoulos	Greece
Mr. Jaroslav Zourek	Czechoslovakia

II. OFFICERS

3. At its meetings on 24 and 25 April 1956, the Commission elected the following officers:

Chairman: Mr. F. V. García Amador;

First Vice-Chairman: Mr. Jaroslav Zourek;

Second Vice-Chairman: Mr. Douglas L. Edmonds;

Rapporteur: Mr. J. P. A. François.

4. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary of the Commission.

III. AGENDA

5. The Commission adopted an agenda for the eighth session consisting of the following items:

1. Régime of the high seas.
2. Régime of the territorial sea.
3. Law of treaties.
4. Diplomatic intercourse and immunities.
5. Consular intercourse and immunities.
6. State responsibility.
7. Arbitral procedure: General Assembly resolution 989 (X).
8. Question of amending Article 11 of the statute of the Commission: General Assembly resolution 986 (X).
9. Publication of the documents of the Commission: General Assembly resolution 987 (X).
10. Co-operation with inter-American bodies.
11. Date and place of the ninth session.
12. Planning of future work of the Commission.
13. Other business.

6. In the course of the session, the Commission held fifty-one meetings. It considered all the items on the above agenda with the exception of Diplomatic intercourse and immunities (item 4) and Arbitral procedure (item 7), these latter subjects being postponed until its next session.

CHAPTER II

LAW OF THE SEA

I. INTRODUCTION

7. At its first session (1949), the International Law Commission drew up a provisional list of topics whose codification it considered necessary and feasible. Among the items in this list were the régime of the high seas and the régime of the territorial sea. The Commission included the régime of the high seas among the topics to be given priority and appointed Mr. J. P. A. François special rapporteur for it. Subsequently, at its third session (1951), in pursuance of a recommendation contained in General Assembly resolution 374 (IV), the Commission decided to initiate work on the régime of the territorial sea and appointed Mr. François special rapporteur for that topic as well.

(a) RÉGIME OF THE HIGH SEAS

8. At its second session (1950), the Commission considered the question of the high seas, taking as a basis of discussion the report of the special rapporteur (A/CN.4/17). The Commission was of the opinion that it could not undertake the codification of the law of the high seas in all its aspects, and that it would have to select the subjects which it could take up in the first phase of its work on the topic. The Commission thought it could for the time being leave aside all those subjects which were being studied by other United Nations organs or by specialized agencies. The Commission also left out subjects which, because of their technical nature, were not suitable for study by it. Lastly, it set aside a number of other subjects the importance of which did not appear to justify consideration at that stage of the work.

9. At the third session (1951), the Special Rapporteur submitted his second report on the high seas (A/CN.4/42). The Commission first examined the chapters of the report dealing with the continental shelf and various related subjects, namely, conservation of the resources of the sea, sedentary fisheries and the contiguous zone. The Commission decided to publish its draft on these questions¹ in accordance with its statute, and to invite the governments to submit their comments on it. The Commission also considered various other subjects part of the régime of the high seas, and requested the special rapporteur to submit a further report at its fourth session.

10. At its fourth session (1952), the Commission had before it the third report of the special rapporteur (A/CN.4/51). In addition, the Commission received comments on its draft articles on the continental shelf and related subjects from a number of governments.² Owing to lack of time the Commission was obliged to defer consideration of these questions until its fifth session.

¹ Official Records of the General Assembly, 6th Sess., Supp. No. 9 (A/1858), annex.

² Official Records of the General Assembly, 8th Sess., Supp. No. 9 (A/2456), annex II.

11. At its fifth session (1953), in the light of the comments from governments and on the basis of a new report by the special rapporteur (A/CN.4/60), the Commission re-examined the following questions: (1) continental shelf; (2) fishery resources of the seas; (3) contiguous zone. In its work on the subject the Commission derived considerable assistance from a collection, in two volumes, published in 1951 and 1952 by the Division for the Development and Codification of International Law of the Legal Department of the Secretariat and entitled "Laws and Regulations on the Régime of the High Seas."³ The Commission prepared revised drafts on the three questions mentioned above.⁴ The Commission to some extent reversed the decision taken at its second session by requesting the special rapporteur to prepare for the sixth session a new report covering certain subjects concerning the high seas not dealt with in the earlier reports. While reverting to the idea of codifying the law of the sea, the Commission decided not to include any provisions on technical matters or to encroach on ground already covered in special studies by other United Nations organs or specialized agencies.

12. At the sixth session (1954), shortage of time prevented the Commission from dealing with the question of the high seas and from examining the special rapporteur's fifth report (A/CN.4/69), which was specially devoted to penal jurisdiction in matters of collision.

13. At its seventh session (1955), the Commission adopted, on the basis of the special rapporteur's sixth report (A/CN.4/79), a provisional draft on the régime of the high seas,⁵ with commentaries, which was submitted to governments for observation. The Commission also decided to communicate the chapter on the conservation of the living resources of the sea to the organizations represented by observers at the International Technical Conference on the Conservation of the Living Resources of the Sea, held at Rome from 18 April to 10 May 1955. In preparing the articles dealing with the conservation of the living resources of the sea, the Commission took account of the report⁶ of that Conference.

14. At its eighth session (1956), the Commission examined replies from twenty-five governments (A/CN.4/99 and Add.1 to 9) and from the International Commission for the Northwest Atlantic Fisheries (A/CN.4/100), together with a new report by the special rapporteur (A/CN.4/97 and Add.1 and 3). After careful study of these replies, it drew up a final report in which it incorporated some of the points made.

(b) RÉGIME OF THE TERRITORIAL SEA

15. At its fourth session (1952), the Commission considered certain aspects of the régime of the territorial sea on the basis of a report by the special rapporteur (A/CN.4/53). It dealt in particular with the questions

³ ST/LEG/SER.B/1 and 2.

⁴ Official Records of the General Assembly, 8th Sess., Supp. No. 9 (A/2456), Ch. III.

⁵ Official Records of the General Assembly, 10th Sess., Supp. No. 9 (A/2934), Ch. II.

⁶ Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, 18 April-10 May 1955, Rome. A/Conf.10/6.

of baselines and bays. With regard to the delimitation of the territorial sea of two adjacent states, the Commission decided to ask governments for particulars concerning their practice and for any observations they might consider useful. The Commission also decided that the special rapporteur should be free to consult with experts with a view to elucidating certain technical aspects of the problem.

16. The special rapporteur was asked to submit to the Commission at its fifth session (1953) a further report containing a draft regulation and comments revised in the light of opinions expressed at the fourth session. In compliance with this request, the special rapporteur on 19 February 1953 submitted a second report on the régime of the territorial sea (A/CN.4/61).

✓ 17. The group of experts mentioned above met at The Hague from 14 to 16 April, 1953, under the chairmanship of the special rapporteur. Its members were: Professor L. E. G. Asplund (Geographic Survey Department, Stockholm); Mr. S. Whittemore Boggs (Special Adviser on Geography, Department of State, Washington, D. C.); Mr. P. R. V. Coullault, Ingénieur en chef du Service central hydrographique, Paris); Commander R. H. Kennedy, O.B.E., R.N. (Retd.), (Hydrographic Department, Admiralty, London) Accompanied by Mr. R. C. Shawyer (Administrative Officer, Admiralty, London); Vice-Admiral A. S. Pinke (Retd.), (Royal Netherlands Navy, The Hague). The group of experts submitted a report on technical questions. In the light of their comments, the special rapporteur amended and supplemented some of his own draft articles; these changes appear in an addendum to the second report on the régime of the territorial sea (A/CN.4/61/Add.1 and Corr.1) in which the report of the experts appears as an annex.

18. At its sixth session (1954), the special rapporteur submitted to the Commission a third report on the régime of the territorial sea (A/CN.4/77) in which he incorporated the changes suggested by the observations of the experts. He also took into account the comments received from governments concerning the delimitation of the territorial sea between two adjacent states (A/CN.4/71 and Add.1 and 2).

19. At the sixth session, the Commission adopted a number of provisional articles concerning the régime of the territorial sea,⁷ with a commentary, and invited governments to furnish their observations on the articles.

20. The Secretary-General received comments from eighteen Member States of the United Nations.⁸ At its seventh session (1955), recognizing the cogency of many of the comments, the Commission amended several of the articles.⁹ The Commission also examined certain questions held over in its report of 1954 concerning, *inter alia*, the breadth of the territorial sea, bays and the delimitation of the territorial sea at the mouths of rivers. It submitted these articles to governments for their comments.

21. At its eighth session (1956) the Commission examined the replies

⁷ Official Records of the General Assembly, 9th Sess., Supp. No. 9 (A/2693), Ch. IV.

⁸ Official Records of the General Assembly, 10th Sess., Supp. No. 9 (A/2934), annex [50 A.J.I.L. 240 (1956)].

⁹ *Ibid.*, Ch. III.

by twenty-five governments (A/CN.4/99 and Add.1 to 9) on the basis of the report by the special rapporteur (A/CN.4/97 and Add.2). It then prepared its final report on this subject, incorporating a number of changes deriving from the replies from governments.

(c) LAW OF THE SEA

22. In pursuance of General Assembly resolution 899 (IX) of 14 December 1954, the Commission has grouped together systematically all the rules it has adopted concerning the high seas, the territorial sea, the continental shelf, the contiguous zone and the conservation of the living resources of the sea. In consequence of this rearrangement the Commission has had to make certain changes in the texts adopted.

23. The final report on the subject is in two parts, the first dealing with the territorial sea and the second with the high seas. The second part is divided into three sections: (1) general régime of the high seas; (2) contiguous zone; (3) continental shelf. Each article is accompanied by a commentary.

24. The Commission wishes to preface the text of the articles adopted, by certain observations as to the way in which it considers that practical effect should be given to these rules.

25. When the International Law Commission was set up, it was thought that the Commission's work might have two different aspects: on the one hand the "codification of international law" or, in the words of Article 1 of the Commission's Statute, "the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine"; and on the other hand, the "progressive development of international law" or "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states."

26. In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already "sufficiently developed in practice," but also several of the provisions adopted by the Commission, based on a "recognized principle of international law," have been framed in such a way as to place them in the "progressive development" category. Although it tried at first to decide which articles fell into one and which into the other category the Commission has had to abandon the attempt, as several do not wholly belong to either.

27. In these circumstances, in order to give effect to the project as a whole, it will be necessary to have recourse to conventional means.

28. The Commission therefore recommends, in conformity with Article 23, paragraph 1 (d) of its statute, that the General Assembly should convene an international conference of plenipotentiaries to examine the

Six of these replies are printed in 50 A.J.I.L. 992 (1956).

law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.

29. The Commission is of the opinion that the conference should deal with the various parts of the law of the sea covered by the present report. Judging from its own experience, the Commission considers—and the comments of governments have confirmed this view—that the various sections of the law of the sea hold together, and are so closely interdependent that it would be extremely difficult to deal with only one part and leave the others aside.

30. The Commission considers that such a conference has been adequately prepared for by the work the Commission has done. The fact that there have been fairly substantial differences of opinion on certain points should not be regarded as a reason for putting off such a conference. There has been widespread regret at the attitude of governments after the Hague Codification Conference of 1930 in allowing the disagreement over the breadth of the territorial sea to dissuade them from any attempt at concluding a convention on the points on which agreement had been reached. The Commission expresses the hope that this mistake will not be repeated.

31. In recommending confirmation of the proposed rules as indicated in paragraph 28, the Commission has not had to concern itself with the question of the relationship between the proposed rules and existing conventions. The answer to that question must be found in the general rules of international law and the provisions drawn up by the proposed international conference.

32. The Commission also wishes to make two other observations, which apply to the whole draft:

1. The draft regulates the law of the sea in time of peace only.
2. The term "mile" means nautical mile (1,852 metres) reckoned at sixty to one degree of latitude.

33. The text of the articles concerning the law of the sea, as adopted¹⁰ by the Commission, and the Commission's commentary to the articles are reproduced below.

¹⁰ Sir Gerald Fitzmaurice expressed his dissent from (1) the final paragraph of the commentary to Article 3, insofar as it might suggest that the breadth of the territorial sea was not governed by any existing rule of international law; (2) Article 24, insofar as it made the right of innocent passage of warships subject to prior notification or authorization. He recorded an abstention on those parts of Article 47 (Right of hot pursuit) and the commentary thereto, that related to the question of hot pursuit from within a contiguous zone.

Mr. Krylov was not able to vote for Articles 3 (Breadth of the territorial sea), 22 (Government ships operated for commercial purposes), Articles 39 (Piracy), 57 (Compulsory arbitration) and 73 (Compulsory jurisdiction).

Mr. Zourek, while having voted for the draft articles relating to the law of the sea as a whole, does not accept, for reasons indicated during the discussions, Articles 3 (Breadth of the territorial sea), and 22 (Government ships operated for commercial

II. ARTICLES CONCERNING THE LAW OF THE SEA

PART I. TERRITORIAL SEA

SECTION I. GENERAL

Juridical status of the territorial sea

ARTICLE 1

1. The sovereignty of a state extends to a belt of sea adjacent to its coast described as the territorial sea.

2. This sovereignty is exercised subject to the conditions prescribed in these articles and by other rules of international law.

Juridical status of the airspace over the territorial sea and of its bed and subsoil

ARTICLE 2

The sovereignty of a coastal state extends also to the airspace over the territorial sea as well as to its bed and subsoil.

SECTION II. LIMITS OF THE TERRITORIAL SEA

Breadth of the territorial sea

ARTICLE 3

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.

2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.

3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many states have fixed a breadth greater than three miles and, on the other hand, that many states do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.

Normal baseline

ARTICLE 4

Subject to the provisions of Article 5 and to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on large-scale charts officially recognized by the coastal state.

purpose). He also maintained his reservations regarding Article 7 (Bays). He remained opposed to Articles 57, 59 and 73 relating to compulsory arbitration; he maintained his reservations regarding the definition of piracy in Article 39 and does not accept the commentary relating to that article.

Straight baselines

ARTICLE 5

1. Where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the baseline may be independent of the low-water mark. In these cases, the method of straight baselines joining appropriate points may be employed. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. Account may nevertheless be taken, where necessary, of economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage. Baselines shall not be drawn to and from drying rocks and drying shoals.

2. The coastal state shall give due publicity to the straight baselines drawn by it.

3. Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as defined in Article 15, through those waters shall be recognized by the coastal state in all those cases where the waters have normally been used for international traffic.

Outer limit of the territorial sea

ARTICLE 6

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Bays

ARTICLE 7

1. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semicircle drawn on the mouth of that indentation. If a bay has more than one mouth, this semicircle shall be drawn on a line as long as the sum total of the length of the different mouths. Islands within a bay shall be included as if they were part of the water area of the bay.

2. The waters within a bay, the coasts of which belong to a single state, shall be considered internal waters if the line drawn across the mouth does not exceed fifteen miles measured from the low-water line.

3. Where the mouth of a bay exceeds fifteen miles, a closing line of such length shall be drawn within the bay. When different lines of such

length can be drawn that line shall be chosen which encloses the maximum water area within the bay.

4. The foregoing provisions shall not apply to so-called "historic" bays or in any cases where the straight baseline system provided for in Article 5 is applied.

Ports

ARTICLE 8

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

Roadsteads

ARTICLE 9

Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea. The coastal state must give due publicity to the limits of such roadsteads.

Islands

ARTICLE 10

Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark.

Drying rocks and drying shoals

ARTICLE 11

Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for measuring the extension of the territorial sea.

Delimitation of the territorial sea in straits and off other opposite coasts

ARTICLE 12

1. The boundary of the territorial sea between two states, the coasts of which are opposite each other at a distance less than the extent of the belts of territorial sea adjacent to the two coasts, shall be fixed by agreement between those states. Failing such agreement and unless another boundary line is justified by special circumstances, the boundary is the median line every point of which is equidistant from the nearest points on the baselines from which the breadths of the territorial seas of the two states are measured.

2. If the distance between the two states exceeds the extent of the two belts of territorial sea, the waters lying between the two belts shall form

part of the high seas. Nevertheless, if, as a consequence of this delimitation, an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal states, be deemed to be part of the territorial sea.

3. The first sentence of the preceding paragraph shall be applicable to cases where both coasts belong to one and the same coastal state. If, as a consequence of this delimitation, an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may be declared by the coastal state to form part of its territorial sea.

4. The line of demarcation shall be marked on the officially recognized large-scale charts.

Delimitation of the territorial sea at the mouth of a river

ARTICLE 13

1. If a river flows directly into the sea, the territorial sea shall be measured from a line drawn *inter fauces terrarum* across the mouth of the river.

2. If the river flows into an estuary the coasts of which belong to a single state, Article 7 shall apply.

Delimitation of the territorial sea of two adjacent states

ARTICLE 14

1. The boundary of the territorial sea between two adjacent states shall be determined by agreement between them. In the absence of such agreement, and unless another boundary line is justified by special circumstances, the boundary is drawn by application of the principle of equidistance from the nearest points on the baseline from which the breadth of the territorial sea of each country is measured.

2. The boundary line shall be marked on the officially recognized large-scale charts.

SECTION III. RIGHT OF INNOCENT PASSAGE

Subsection A. General rules

Meaning of the right of innocent passage

ARTICLE 15

1. Subject to the provisions of the present rules, ships of all states shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal state or contrary to the present rules, or to other rules of international law.

4. Passage includes stopping and anchoring, but only insofar as the

same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

5. Submarines are required to navigate on the surface.

Duties of the coastal state

ARTICLE 16

1. The coastal state must not hamper innocent passage through the territorial sea. It is required to use the means at its disposal to ensure respect for innocent passage through the territorial sea and must not allow the said sea to be used for acts contrary to the rights of other states.

2. The coastal state is required to give due publicity to any dangers to navigation of which it has knowledge.

Rights of protection of the coastal state

ARTICLE 17

1. The coastal state may take the necessary steps in its territorial sea to protect itself against any act prejudicial to its security or to such other of its interests as it is authorized to protect under the present rules and other rules of international law.

2. In the case of ships proceeding to internal waters, the coastal state shall also have the right to take the necessary steps to prevent any breach of the conditions to which the admission of those ships to those waters is subject.

3. The coastal state may suspend temporarily in definite areas of its territorial sea the exercise of the right of passage if it should deem such suspension essential for the protection of the rights referred to in paragraph 1. Should it take such action, it is bound to give due publicity to the suspension.

4. There must be no suspension of the innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas.

Duties of foreign ships during their passage

ARTICLE 18

Foreign ships exercising the right of passage shall comply with the laws and regulations enacted by the coastal state in conformity with the present rules and other rules of international law and, in particular, with the laws and regulations relating to transport and navigation.

Subsection B. Merchant ships

Charges to be levied upon foreign ships

ARTICLE 19

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may only be levied upon a foreign ship passing through the territorial sea as payment for specific services rendered to the ship.

Arrest on board a foreign ship

ARTICLE 20

1. A coastal state may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the ship during its passage, save only in the following cases:

- (a) If the consequences of the crime extend beyond the ship; or
- (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
- (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies.

2. The above provisions do not affect the right of the coastal state to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship lying in its territorial sea or passing through the territorial sea after leaving internal waters.

3. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation.

Arrest of ships for the purpose of exercising civil jurisdiction

ARTICLE 21

1. A coastal state may not arrest or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

2. A coastal state may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal state.

3. The provisions of the previous paragraph are without prejudice to the right of the coastal state, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea or passing through the territorial sea after leaving the internal waters.

Subsection C. Government ships other than warships

Government ships operated for commercial purposes

ARTICLE 22

The rules contained in subsections A and B shall also apply to government ships operated for commercial purposes.

Government ships operated for non-commercial purposes

ARTICLE 23

The rules contained in subsection A shall apply to government ships operated for non-commercial purposes.

Subsection D. Warships

• *Passage*

ARTICLE 24

The coastal state may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of Articles 17 and 18.

Non-observance of the regulations

ARTICLE 25

If any warship does not comply with the regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance which may be brought to its notice, the coastal state may require the warship to leave the territorial sea.



PART II. HIGH SEAS

SECTION I. GENERAL RÉGIME

Definition of the high seas

ARTICLE 26

1. The term "high seas" means all parts of the sea that are not included in the territorial sea, as contemplated by Part I, or in the internal waters of a state.

2. Waters within the baseline of the territorial sea are considered "internal waters."

Freedom of the high seas

ARTICLE 27

The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty. Freedom of the high seas comprises, *inter alia*:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

Subsection A. Navigation

The right of navigation

ARTICLE 28

Every state has the right to sail ships under its flag on the high seas.

Nationality of ships

ARTICLE 29 •

1. Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the national character of the ship by other states, there must exist a genuine link between the state and the ship.

2. A merchant ship's right to fly the flag of a state is evidenced by documents issued by the authorities of the state of the flag.

Status of ships

ARTICLE 30

Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

Ships sailing under two flags

ARTICLE 31

A ship which sails under the flags of two or more states, using them according to convenience, may not claim any of the nationalities in question with respect to any other state, and may be assimilated to a ship without nationality.

Immunity of warships

ARTICLE 32

1. Warships on the high seas have complete immunity from the jurisdiction of any state other than the flag state.

2. For the purposes of these articles, the term "warship" means a ship belonging to the naval forces of a state and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

Immunity of other government ships

ARTICLE 33

For all purposes connected with the exercise of powers on the high seas by states other than the flag state, ships owned or operated by a state and

used only on government service, whether commercial or non-commercial, shall be assimilated to and shall have the same immunity as warships.

Safety of navigation

ARTICLE 34

1. Every state is required to issue for ships under its jurisdiction regulations to ensure safety at sea with regard *inter alia* to:

(a) The use of signals, the maintenance of communications and the prevention of collisions;

(b) The crew which must be adequate to the needs of the ship and enjoy reasonable labour conditions;

(c) The construction, equipment and seaworthiness of the ship.

2. In issuing such regulations, each state is required to observe internationally accepted standards. It shall take the necessary measures to secure observance of the regulations.

Penal jurisdiction in matters of collision

ARTICLE 35

1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag state or of the state of which the accused person is a national.

2. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag state.

Duty to render assistance

ARTICLE 36

Every state shall require the master of a ship sailing under its flag, insofar as he can do so without serious danger to the ship, the crew or the passengers,

(a) To render assistance to any person found at sea in danger of being lost;

(b) To proceed with all speed to the rescue of persons in distress if informed of their need of assistance, insofar as such action may reasonably be expected of him;

(c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

Slave trade

ARTICLE 37

Every state shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its colours, and to prevent the

unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its colours, shall *ipso facto* be free.

Piracy

ARTICLE 38

All states shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.

ARTICLE 39

Piracy consists in any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or against persons or property on board such a ship;

(b) Against a ship, persons or property in a place outside the jurisdiction of any state;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of incitement or of intentional facilitation of an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

ARTICLE 40

The acts of piracy, as defined in Article 39, committed by a government ship or a government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private vessel.

ARTICLE 41

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 39. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

ARTICLE 42

A ship or aircraft may retain its national character although it has become a pirate ship or aircraft. The retention or loss of national character is determined by the law of the state from which the national character was originally derived.

ARTICLE 43

On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship taken by

piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

ARTICLE 44

Where the seizure of a ship or aircraft on suspicion of piracy has been affected without adequate grounds, the state making the seizure shall be liable to the state the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.

ARTICLE 45

A seizure on account of piracy may only be carried out by warships or military aircraft.

Right of visit

ARTICLE 46

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the ship is engaged in piracy; or

(b) That while in the maritime zones treated as suspect in the international conventions for the abolition of the slave trade, the ship is engaged in that trade; or

(c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's title to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

Right of hot pursuit

ARTICLE 47

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that state. Such pursuit must be commenced when the foreign ship is within the internal waters

or the territorial sea of the pursuing state, and may only be continued outside the territorial sea if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea receives the order to stop, the ship giving the order should likewise be within the territorial sea. If the foreign ship is within a contiguous zone, as defined in Article 66, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third state.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by bearings, sextant angles or other like means, that the ship pursued or one of its boats is within the limits of the territorial sea or, as the case may be, within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraphs 1 to 3 of the present article shall apply *mutatis mutandis*;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship of the coastal state, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself.

6. The release of a ship arrested within the jurisdiction of a state and escorted to a port of that state for the purposes of an enquiry before the competent authorities, may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

Pollution of the high seas

ARTICLE 48

1. Every state shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation of the seabed and its subsoil, taking account of existing treaty provisions on the subject.

2. Every state shall draw up regulations to prevent pollution of the seas from the dumping of radioactive waste.

3. All states shall co-operate in drawing up regulations with a view to the prevention of pollution of the seas or airspace above, resulting from experiments or activities with radioactive materials or other harmful agents.

Subsection B. Fishing

Right to fish

ARTICLE 49

All states have the right for their nationals to engage in fishing on the high seas, subject to their treaty obligations and to the provisions contained in the following articles concerning conservation of the living resources of the high seas.

Conservation of the living resources of the high seas

ARTICLE 50

As employed in the present articles, the expression "conservation of the living resources of the high seas" means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.

ARTICLE 51

A state whose nationals are engaged in fishing in any area of the high seas where the nationals of other states are not thus engaged shall adopt measures for regulating and controlling fishing activities in that area when necessary for the purpose of the conservation of the living resources of the high seas.

ARTICLE 52

1. If the nationals of two or more states are engaged in fishing the same stock or stocks of fish or other marine resources in any area of the high seas, these states shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement the necessary measures for the conservation of such resources.

2. If the states concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by Article 57.

ARTICLE 53

1. If, subsequent to the adoption of the measures referred to in Articles 51 and 52, nationals of other states engage in fishing the same stock or stocks of fish or other marine resources in the same area, the conservation measures adopted shall be applicable to them.

2. If these other states do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure contemplated by Article 57. Subject to paragraph 2 of Article 58, the measures adopted shall remain obligatory pending the arbitral decision.

ARTICLE 54

1. A coastal state has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

2. A coastal state is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there.

3. If the states concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by Article 57.

ARTICLE 55

1. Having regard to the provisions of paragraph 1 of Article 54, any coastal state may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other states concerned have not led to an agreement within a reasonable period of time.

2. The measures which the coastal state adopts under the previous paragraph shall be valid as to other states only if the following requirements are fulfilled:

(a) That scientific evidence shows that there is an urgent need for measures of conservation;

(b) That the measures adopted are based on appropriate scientific findings;

(c) That such measures do not discriminate against foreign fishermen.

3. If these measures are not accepted by the other states concerned, any of the parties may initiate the procedure contemplated by Article 57. Subject to paragraph 2 of Article 58, the measures adopted shall remain obligatory pending the arbitral decision.

ARTICLE 56

1. Any state which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent to its coast, has a special interest in the conservation of the living resources in that area, may request the state whose nationals are engaged in fishing there to take the necessary measures of conservation.

2. If no agreement is reached within a reasonable period, such state may initiate the procedure contemplated by Article 57.

ARTICLE 57

1. Any disagreement arising between states under Articles 52, 53, 54, 55 and 56 shall, at the request of any of the parties, be submitted for settlement to an arbitral commission of seven members, unless the parties agree to seek a solution by another method of peaceful settlement.

2. Except as provided in paragraph 3, two members of the arbitral commission shall be named by the state or states on the one side of the dispute, and two members shall be named by the state or states contending to the contrary, but only one of the members nominated by each side may be a national of a state on that side. The remaining three members, one of whom shall be designated as chairman, shall be named by agreement be-

tween the states in dispute. Failing agreement they shall, upon the request of any state party, be nominated by the Secretary-General of the United Nations after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization, from nationals of countries not parties to the dispute. If, within a period of three months from the date of the request for arbitration, there shall be a failure by those on either side in the dispute to name any member, such member or members shall, upon the request of any party, be named, after such consultation, by the Secretary-General of the United Nations. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

3. If the parties to the dispute fall into more than two opposing groups, the arbitral commission shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations, after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization, from amongst well-qualified persons specializing in legal, administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

4. Except as herein provided the arbitral commission shall determine its own procedure. It shall also determine how the costs and expenses shall be divided between the parties.

5. The arbitral commission shall in all cases be constituted within three months from the date of the original request and shall render its decision within a further period of five months unless it decides, in case of necessity, to extend that time limit.

ARTICLE 58

1. The arbitral commission shall, in the case of measures unilaterally adopted by coastal states, apply the criteria listed in paragraph 2 of Article 55. In other cases it shall apply these criteria according to the circumstances of each case.

2. The arbitral commission may decide that pending its award the measures in dispute shall not be applied.

ARTICLE 59

The decisions of the arbitral commission shall be binding on the states concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration.

Fisheries conducted by means of equipment embedded in the floor of the sea

ARTICLE 60

The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial

sea of a state, may be undertaken by that state where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals. Such regulations will not, however, affect the general status of the areas as high seas.

Subsection C. Submarine cables and pipelines

ARTICLE 61

1. All states shall be entitled to lay telegraph, telephone or high-voltage power cables and pipelines on the bed of the high seas.

2. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal state may not impede the laying or maintenance of such cables or pipelines.

ARTICLE 62

Every state shall take the necessary legislative measures to provide that the breaking or injury of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine high-voltage power cable or pipeline, shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.

ARTICLE 63

Every state shall take the necessary legislative measures to provide that, if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost.

ARTICLE 64

Every state shall regulate trawling so as to ensure that all the fishing gear used shall be so constructed and maintained as to reduce to the minimum any danger of fouling submarine cables or pipelines.

ARTICLE 65

Every state shall take the necessary legislative measures to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injuring a submarine cable or pipeline shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.

SECTION II. CONTIGUOUS ZONE

ARTICLE 66

1. In a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to

(a) Prevent infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea. •

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

SECTION III. CONTINENTAL SHELF

ARTICLE 67

For the purposes of these articles, the term "continental shelf" is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres (approximately 100 fathoms) or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

ARTICLE 68

The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

ARTICLE 69

The rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

ARTICLE 70

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal state may not impede the laying or maintenance of submarine cables on the continental shelf.

ARTICLE 71

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea.

2. Subject to the provisions of paragraphs 1 and 5 of this article, the coastal state is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resources, and to establish safety zones at a reasonable distance around such installations and take in those zones measures necessary for their protection.

3. Such installations, though under the jurisdiction of the coastal state, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal state.

4. Due notice must be given of any such installations constructed, and permanent means for giving warning of their presence must be maintained.

5. Neither the installations themselves, nor the said safety zones around them may be established in narrow channels or where interference may be caused in recognized sea lanes essential to international navigation.

ARTICLE 72

1. Where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such states shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the baselines from which the breadth of the territorial sea of each country is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the baselines from which the breadth of the territorial sea of each of the two countries is measured.

ARTICLE 73

Any disputes that may arise between states concerning the interpretation or application of Articles 67-72 shall be submitted to the International Court of Justice at the request of any of the parties, unless they agree on another method of peaceful settlement.

III. COMMENTARY TO THE ARTICLES CONCERNING THE LAW OF THE SEA

PART I. TERRITORIAL SEA

SECTION I. GENERAL

Juridical status of the territorial sea

ARTICLE 1

1. The sovereignty of a state extends to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the conditions prescribed in these articles and by other rules of international law.

Commentary

(1) Paragraph 1 brings out the fact that the rights of the coastal state over the territorial sea do not differ in nature from the rights of sovereignty

which the state exercises over other parts of its territory. There is an essential difference between the régime of the territorial sea and that of the high seas since the latter is based on the principle of free use by all nations. The replies from governments in connexion with the Hague Codification Conference of 1930 and the report of the Conference's Committee on the subject confirmed that this view, which is almost unanimously held, is in accordance with existing law. It is also the principle underlying a number of multilateral conventions—such as the Air Navigation Convention of 1919 and the International Civil Aviation Convention of 1944—which treat the territorial sea in the same way as other parts of state territory.

(2) The Commission preferred the term "territorial sea" to "territorial waters." It was of the opinion that the term "territorial waters" might lead to confusion, since it is used to describe both internal waters only, and internal waters and the territorial sea combined. For the same reason, the Codification Conference also expressed a preference for the term "territorial sea." Although not yet universally accepted, this term is becoming more and more prevalent.

(3) Clearly, sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law.

(4) Some of the limitations imposed by international law on the exercise of sovereignty in the territorial sea are set forth in the present articles which cannot, however, be regarded as exhaustive. Incidents in the territorial sea raising legal questions are also governed by the general rules of international law, and these cannot be specially codified in the present draft for the purposes of their application to the territorial sea. That is why "other rules of international law" are mentioned in addition to the provisions contained in the present articles.

(5) It may happen that, by reason of some special relationship, geographical or other, between two states, rights in the territorial sea of one of them are granted to the other in excess of the rights recognized in the present draft. It is not the Commission's intention to limit in any way any more extensive right of passage or other right enjoyed by states by custom or treaty.

*Juridical status of the airspace over the territorial sea
and of its bed and subsoil*

ARTICLE 2

The sovereignty of a coastal state extends also to the airspace over the territorial sea as well as to its bed and subsoil.

Commentary

This article is taken, except for purely stylistic changes, from the regulations proposed by the 1930 Codification Conference. Since the present draft deals solely with the sea, the Commission did not study the conditions under which sovereignty over the airspace, seabed and subsoil is exercised.

SECTION II. LIMITS OF THE TERRITORIAL SEA

Breadth of the territorial sea

ARTICLE 3

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.

2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.

3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many states have fixed a breadth greater than three miles and, on the other hand, that many states do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.

Commentary

(1) At its seventh session the Commission had adopted certain guiding principles concerning the limits of the territorial sea, but before drafting the final text of an article on this subject, it had wished to see the comments of governments.

(2) First of all, the Commission had recognized that international practice was not uniform as regards the traditional limitation of the territorial sea to three miles. In the opinion of the Commission, that was an incontrovertible fact.

(3) Next the Commission had stated that international law did not justify an extension of the territorial sea beyond twelve miles. In its opinion, such an extension infringed the principle of the freedom of the seas, and was therefore contrary to international law.

(4) Finally the Commission had stated that it took no decision as to the breadth of the territorial sea up to the limit of twelve miles. Some members held that as the rule fixing the breadth at three miles had been widely applied in the past and was still maintained by a number of important maritime states, it should, in the absence of any other rule of equal authority, be regarded as recognized by international law and binding on all states. That view was not supported by the majority of the Commission; at its seventh session, however, the Commission did not succeed in reaching agreement on any other limit. The extension by a state of its territorial sea to a breadth of between three and twelve miles was not characterized by the Commission as a breach of international law. Such an extension would be valid for any other state which did not object to it, and *a fortiori* for any state which recognized it tacitly or by treaty, or was a party to a judicial or arbitral decision recognizing the extension. A claim to a territorial sea not exceeding twelve miles in breadth could be sustained *erga omnes* by any state, if based on historic rights. But, subject to such cases, the Commission by a small majority declined to

question the right of other states not to recognize an extension of the territorial sea beyond the three-mile limit.

(5) At its eighth session, the Commission resumed its study of this problem in the light of the comments by governments. Those comments showed a wide diversity of opinion, and the same diversity was noted within the Commission. Several proposals were made; they are referred to below in the order in which they were put to the vote. Some members were of the opinion that it was for each coastal state, in the exercise of its sovereign powers, to fix the breadth of its territorial sea. They considered that in all cases where the delimitation of the territorial sea was justified by the real needs of the coastal state, the breadth of the territorial sea was in conformity with international law; this would cover the case of those states which had fixed the breadth at between three and twelve miles. Another opinion was that the Commission should recognize that international practice was not uniform as regards limitation of the territorial sea to three miles, but would not authorize an extension of the territorial sea beyond twelve miles. On the other hand every state would have the right to extend its jurisdiction up to twelve miles. A third opinion was that the Commission should recognize that every coastal state was entitled to a territorial sea of a breadth of at least three, but not exceeding twelve, miles. If, within those limits, the breadth was not determined by long usage, it should not exceed what was necessary for satisfying the justifiable interests of the state, taking into account also the interests of the other states in maintaining the freedom of the high seas and the breadth generally applied in the region. In case of a dispute, the question should, at the request of either of the parties, be referred to the International Court of Justice. A fourth opinion was reflected in a proposal to state that the breadth of the territorial sea could be determined by the coastal state in accordance with its economic and strategic needs within the limits of three and twelve miles, subject to recognition by states maintaining a narrower belt. According to a fifth opinion and proposal, the breadth of the territorial sea would be three miles, but a greater breadth should be recognized if based on customary law. Furthermore, any state might fix the breadth of its territorial sea at a higher figure than three miles, but such an extension could not be claimed against states which had not recognized it or had not adopted an equal or greater breadth. In no case could the breadth of the territorial sea exceed twelve miles.

(6) None of these proposals managed to secure a majority in the Commission, which, while recognizing that it differs in form from the other articles, finally accepted, by a majority vote, the text included in this draft as Article 3.

(7) The Commission noted that the right to fix the limit of the territorial sea at three miles was not disputed. It states that international law does not permit that limit to be extended beyond twelve miles. As regards the right to fix the limit between three and twelve miles, the Commission was obliged to note that international practice was far from uniform. Since several states have established a breadth of between three

and twelve miles, while others are not prepared to recognize such extensions, the Commission was unable to take a decision on the subject, and expressed the opinion that the question should be decided by an international conference of plenipotentiaries.

(8) It follows from the foregoing that the Commission came out clearly against claims to extend the territorial sea to a breadth which, in its view, jeopardizes the principle that has governed maritime law since Grotius, namely, the freedom of the high seas. On the other hand, the Commission did not succeed in fixing the limit between three and twelve miles.

(9) The Commission considered the possibility of adopting a rule that all disputes concerning the breadth of the territorial sea should be submitted to the compulsory jurisdiction of the International Court of Justice. The majority of the Commission, however, were unwilling to ask the Court to undertake the settlement of disputes on a subject regarding which the international community had not yet succeeded in formulating a rule of law. It did not wish to delegate an essentially legislative function to a judicial organ which, moreover, cannot render decisions binding on states other than the parties. For those reasons it considered that the question should be referred to the proposed conference.

Normal baseline

ARTICLE 4

Subject to the provisions of Article 5 and to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on large-scale charts officially recognized by the coastal state.

Commentary

(1) The Commission was of the opinion that, according to the international law in force, the extent of the territorial sea is measured either from the low-water line along the coast, or, in the circumstances envisaged in Article 5, from straight baselines independent of the low-water mark. This is how the Commission interprets the judgement of the International Court of Justice rendered on 10 December 1951 in the Fisheries Case between the United Kingdom and Norway.¹¹

(2) The traditional expression "low-water mark" may have different meanings; there is no uniform standard by which states in practice determine this line. The Commission considers that it is permissible to adopt as the baseline the low-water mark as indicated on large-scale charts officially recognized by the coastal state. The Commission is of opinion that the omission of detailed provisions such as were prepared by the 1930 Codification Conference is hardly likely to induce governments to shift the low-water lines on their charts unreasonably.

¹¹ I. C. J. Reports, 1951, p. 116.

Straight baselines

ARTICLE 5

1. Where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the baseline may be independent of the low-water mark. In these cases, the method of straight baselines joining appropriate points may be employed. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. Account may nevertheless be taken, where necessary, of economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage. Baselines shall not be drawn to and from drying rocks and drying shoals.

2. The coastal state shall give due publicity to the straight baselines drawn by it.

3. Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as defined in Article 15, through those waters shall be recognized by the coastal state in all those cases where the waters have normally been used for international traffic.

Commentary

(1) The International Court of Justice, in its decision regarding the Fisheries Case between the United Kingdom and Norway, considered that where the coast is deeply indented or cut into, or where it is bordered by an insular formation such as the Skjaergaard in Norway, the baseline becomes independent of the low-water mark and can only be determined by means of a geometric construction. The Court said:

“[In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuosities. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast; the rule would disappear under the exceptions. Such a coast, viewed as a whole, calls for the application of a different method; that is, the method of base-lines which, within reasonable limits, may depart from the physical line of the coast] . . .

“The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later. The Court will confine itself at this stage to noting that, in order to apply this principle, several States have deemed it necessary to follow the straight baselines method and that they have not encountered objections of principle by other States. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but also in cases of minor curvatures

of the coast line where it was solely a question of giving a simpler form to the belt of territorial waters."¹²

(2) The Commission interpreted the Court's judgement, which was delivered on the point in question by a majority of 10 votes to 2, as expressing the law in force; it accordingly drafted the article on the basis of this judgement. It felt, however, that certain rules advocated by the group of experts who met at The Hague in 1953 (see introduction to Chapter II, paragraph 17 above) might serve to round off the criteria adopted by the Court. Consequently, at its sixth session, it inserted the following supplementary rules in paragraph 2 of the article:

"As a general rule, the maximum permissible length for a straight baseline shall be ten miles. Such baselines may be drawn, when justified according to paragraph 1, between headlands of the coastline or between any such headland and an island less than five miles from the coast, or between such islands. Longer straight baselines may, however, be drawn provided that no point on such lines is more than five miles from the coast. Baselines shall not be drawn to and from drying rocks and shoals."¹³

(3) Some governments raised objections to this paragraph 2, arguing that the maximum length of ten miles for baselines and the maximum distance from the coast of five miles seemed arbitrary and, moreover, not in conformity with the Court's decision. Against this certain members of the Commission pointed out that the Commission had drafted these provisions for application "as a general rule" and that it would always be possible to depart from them if special circumstances justified doing so. In the opinion of those members, the criteria laid down by the Court was not sufficiently precise for general application. However, at its seventh session in 1955, after further study of the question the Commission decided, by a majority, that paragraph 2 should be deleted so as not to make the provisions of paragraph 1 too mechanical. Only the final sentence was kept and added to paragraph 1.

(4) At this same session, the Commission made a number of changes designed to bring the text even more closely into line with the Court's judgement in the above-mentioned Fisheries Case. In particular it inserted in the first sentence the words: "or where this is justified by economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage."¹⁴ Some governments stated in their comments on the 1955 text that they could not support the insertion of "economic interests" in the first sentence of the article. In their opinion, this reference to economic interests was based on a misinterpretation of the Court's judgement. The interests taken into account in the judgement were considered solely in the light of the historical and geo-

¹² *Ibid.*, pp. 129 and 130. The passage within brackets is a translation, provided by the Registry of the International Court of Justice, for the authoritative French text of the judgement; it is inserted here instead of the corresponding passage reproduced in the I.C.J. Reports, 1951, which is somewhat distorted by printing errors.

¹³ Official Records of the General Assembly, 9th Sess., Supp. No. 9 (A/2693), p. 14.

¹⁴ Official Records of the General Assembly, 10th Sess., Supp. No. 9 (A/2934), p. 17.

graphical factors involved and should not constitute a justification in themselves. The application of the straight baseline system should be justified in principle on other grounds before purely local economic considerations could justify a particular way of drawing the lines.

(5) Although this interpretation of the judgement was not supported by all the members, the great majority of the Commission endorsed this view at the eighth session, and the article was recast in that sense.

(6) The question arose whether in waters which become internal waters when the straight baseline system is applied the right of passage should not be granted in the same way as in the territorial sea. Stated in such general terms, this argument was not approved by the majority of the Commission. The Commission was, however, prepared to recognize that if a state wished to make a fresh delimitation of its territorial sea according to the straight baseline principle, thus including in its internal waters parts of the high seas or of the territorial sea that had previously been waters through which international traffic passed, other nations could not be deprived of the right of passage in those waters. Paragraph 3 of the article is designed to safeguard that right.

(7) Straight baselines may be drawn only between points situated on the territory of a single state. An agreement between two states under which such baselines were drawn along the coast and connecting points situated on the territories of different states, would not be enforceable against other states.

(8) Straight baselines may be drawn to islands situated in the immediate vicinity of the coast, but not to drying rocks and drying shoals. Only rocks or shoals permanently above sea level may be used for this purpose. Otherwise the distance between the baselines and the coast might be extended more than is required to fulfil the purpose for which the straight baseline method is applied, and, in addition, it would not be possible at high tide to sight the points of departure of the baselines.

Outer limit of the territorial sea

ARTICLE 6

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Commentary

(1) According to the committee of experts (see introduction to Chapter II, paragraph 17 above), this method of determining the outer limit has already been in use for a long time. In the case of deeply indented coasts the line it gives departs from the line which follows the sinuosities of the coast. It is undeniable that the latter line would often be so tortuous as to be unusable for purposes of navigation.

(2) The line all the points of which are at a distance of T miles from the nearest point on the coast (T being the breadth of the territorial

sea) may be obtained by means of a continuous series of arcs of circles drawn with a radius of T miles from all points on the coastline. The outer limit of the territorial sea is formed by the most seaward arcs. In the case of a rugged coast, this line, although undulating, will be less of a zigzag than if it followed all the sinuosities of the coast, because circles drawn from those points on the coast where it is most deeply indented will not usually affect the outer limit of the seaward arcs. In the case of a straight coast, or if the straight baseline method is followed, the arcs of circles method produces the same result as the strictly parallel line.

(3) The Commission considers that the arcs of circles method is to be recommended because it is likely to facilitate navigation. In any case, the Commission feels that states should be free to use this method without running the risk of being charged with a breach of international law on the ground that the line does not follow all the sinuosities of the coast.

Bays

ARTICLE 7

1. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semicircle drawn on the mouth of that indentation. If a bay has more than one mouth, this semicircle shall be drawn on a line as long as the sum total of the length of the different mouths. Islands within a bay shall be included as if they were part of the water area of the bay.

2. The waters within a bay, the coasts of which belong to a single state, shall be considered internal waters if the line drawn across the mouth does not exceed fifteen miles measured from the low-water line.

3. Where the mouth of a bay exceeds fifteen miles, a closing line of such length shall be drawn within the bay. When different lines of such length can be drawn that line shall be chosen which encloses the maximum water area within the bay.

4. The foregoing provisions shall not apply to so-called "historic" bays, or in any cases where the straight baseline system provided for in Article 5 is applied.

Commentary

(1) Paragraph 1, which is taken from the report of the committee of experts mentioned above, lays down the conditions that must be satisfied by an indentation or curve in order to be regarded as a bay. In adopting this provision, the Commission repaired the omission to which attention had already been drawn by the Hague Codification Conference of 1930 and which the International Court of Justice again pointed out in its judgment in the Fisheries Case. Such an explanation was necessary in order to prevent the system of straight baselines from being applied to coasts

whose configuration does not justify it, on the pretext of applying the rules for bays.

(2) If, as a result of the presence of islands, an indentation whose features as a "bay" have to be established has more than one mouth, the total length of the lines drawn across all the different mouths will be regarded as the width of the bay. Here, the Commission's intention was to indicate that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland, and this consideration may justify some alteration in the ratio between the width and the penetration of the indentation. In such a case an indentation which, if it had no islands at its mouth, would not fulfil the necessary conditions, is to be recognized as a bay. Nevertheless, islands at the mouth of a bay cannot be considered as "closing" the bay if the ordinary sea route passes between them and the coast.

(3) The Commission discussed at length the question of the conditions under which the waters of a bay can be regarded as internal waters. The majority considered that it was not sufficient to lay down that the waters must be closely linked to the land domain by reason of the depth of penetration of the bay into the mainland, or otherwise by its configuration, or by reason of the utility the bay might have from the point of view of the economic needs of the country. These criteria lack legal precision.

(4) The majority of the Commission took the view that the maximum length of the closing line must be stated in figures and that a limitation based on geographical or other considerations, which would necessarily be vague, would not suffice. It considered, however, that the limit should be more than ten miles. Although not prepared to establish a direct relationship between the length of the closing line and the breadth of the territorial sea—such a relationship was formally denied by certain members of the Commission—it felt bound to take some account of tendencies to extend the breadth of the territorial sea by lengthening the closing line of bays. As an experiment the Commission suggested, at its seventh session, a distance of twenty-five miles; thus, the length of the closing line would be slightly more than twice the permissible maximum breadth of the territorial sea as laid down in paragraph 2 of Article 3. Since, firstly, historic bays, some of which are wider than twenty-five miles, would not come under the article and since, secondly, the provision contained in paragraph 1 of the article concerning the characteristics of a bay was calculated to prevent abuse, it seemed not unlikely that some extension of the closing line would be more readily accepted than an extension of the breadth of the territorial sea in general. At the seventh session, the majority of the Commission rejected a proposal that the length of the closing line should be set at twice the breadth of the territorial sea, primarily because it considered such a delimitation unacceptable to states that have adopted a breadth of three or four miles for their territorial sea. At its eighth session the Commission again examined this question in the light of replies from governments. The proposal to extend the closing line to twenty-five miles had found little support; a number of

governments stated that, in their view, such an extension was excessive. By a majority, the Commission decided to reduce the twenty-five miles figure, proposed in 1955, to fifteen miles. While appreciating that a line of ten miles had been recognized by several governments and established by international conventions, the Commission took account of the fact that the origin of the ten-mile line dates back to a time when the breadth of the territorial sea was much more commonly fixed at three miles than it is now. In view of the tendency to increase the breadth of the territorial sea, the majority in the Commission thought that an extension of the closing line to fifteen miles would be justified and sufficient.

(5) If the mouth of a bay is more than fifteen miles wide, the closing line will be drawn within the bay at the point nearest to the sea where the width does not exceed that distance. Where more than one line of fifteen miles in length can be drawn, the closing line will be so selected as to enclose the maximum water area within the bay. The Commission believes that other methods proposed for drawing this line will give rise to uncertainties that will be avoided by adopting the above method, which is that proposed by the above-mentioned committee of experts.

(6) Paragraph 4 states that the foregoing provisions shall not apply to "historic" bays.

(7) The Commission felt bound to propose only rules applicable to bays the coasts of which belong to a single state. As regards other bays, the Commission has not sufficient data at its disposal concerning the number of cases involved or the regulations at present applicable to them.

Ports

ARTICLE 8

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

Commentary

(1) The waters of a port up to a line drawn between the outermost installations form part of the internal waters of the coastal state. No rules for ports have been included in this draft, which is exclusively concerned with the territorial sea and the high seas.

(2) Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works.

(3) Where such structures are of excessive length (for instance, a jetty extending several kilometres into the sea), it may be asked whether this article could still be applied or whether it would not be necessary, in such cases, to adopt the system of safety zones provided for in Article 71 for installations on the continental shelf. As such cases are very rare, the Commission, while wishing to draw attention to the matter, did not deem it necessary to state an opinion.

Roadsteads

ARTICLE 9

Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea. The coastal state must give due publicity to the limits of such roadsteads.

Commentary

In substance, this article is based on the 1930 Codification Conference text. With some dissenting opinions, the Commission considered that roadsteads situated outside the territorial sea should not be treated as internal waters. While appreciating that the coastal state must be able to exercise special supervisory and police rights in such roadsteads, the Commission thought it would be going too far to treat them as internal waters, since innocent passage through them might then be prohibited. It considered that the rights of the coastal state were sufficiently safeguarded by the recognition of such waters as territorial sea.

Islands

ARTICLE 10

Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark.

Commentary

(1) This article applies both to islands situated in the high seas and to islands situated in the territorial sea. In the case of the latter, their own territorial sea will partly coincide with the territorial sea of the mainland. The presence of the island will create a bulge in the outer limit of the territorial sea of the mainland. The same idea can be expressed in the following form: islands, wholly or partly situated in the territorial sea, shall be taken into consideration in determining the outer limit of the territorial sea.

(2) An island is understood to be any area of land surrounded by water which, except in abnormal circumstances, is permanently above high-water mark. Consequently, the following are not considered islands and have no territorial sea:

(i) Elevations which are above water at low tide only. Even if an installation is built on such an elevation and is itself permanently above water—a lighthouse, for example—the elevation is not an “island” as understood in this article;

(ii) Technical installations built on the seabed, such as installations used for the exploitation of the continental shelf (see Article 71). The Commission nevertheless proposed that a safety zone around such installations should be recognized in view of their extreme vulnerability.

It does not consider that a similar measure is required in the case of lighthouses.

(3) The Commission had intended to follow up this article with a provision concerning groups of islands. Like the Hague Conference for the Codification of International Law of 1930, the Commission was unable to overcome the difficulties involved. The problem is singularly complicated by the different forms it takes in different archipelagos. The Commission was prevented from stating an opinion, not only by disagreement on the breadth of the territorial sea, but also by lack of technical information on the subject. It recognizes the importance of this question and hopes that if an international conference subsequently studies the proposed rules it will give attention to it.

(4) The Commission points out, for purposes of information, that Article 5 may be applicable to groups of islands lying off the coast.

Drying rocks and drying shoals

ARTICLE 11

Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for measuring the extension of the territorial sea.

Commentary

(1) Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will make allowance for the presence of such drying rocks and will show bulges accordingly. On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own.

(2) It was suggested that the terms of Article 5 (under which straight baselines are not drawn to or from drying rocks and shoals) might be incompatible with the present article. The Commission sees no incompatibility. The fact that for the purpose of determining the breadth of the territorial sea drying rocks and shoals are assimilated to islands does not imply that such rocks and shoals are treated as islands in every respect. In the comment to Article 5 it has already been pointed out that if they were so treated, then, where straight baselines are drawn, and particularly in the case of shallow waters off the coast, the distance between the baseline and the coast might be far greater than that required to fulfil the purpose for which the straight baseline method was designed.

Delimitation of the territorial sea in straits and off other opposite coasts

ARTICLE 12

1. The boundary of the territorial sea between two states, the coasts of which are opposite each other at a distance less than the extent of the belts of territorial sea adjacent to the two coasts, shall be fixed by agreement between those states. Failing such agreement and unless another

boundary line is justified by special circumstances, the boundary is the median line every point of which is equidistant from the nearest points on the baselines from which the breadths of the territorial seas of the two states are measured.

2. If the distance between the two states exceeds the extent of the two belts of territorial sea, the waters lying between the two belts shall form part of the high seas. Nevertheless, if, as a consequence of this delimitation, an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal states, be deemed to be part of the territorial sea.

3. The first sentence of the preceding paragraph shall be applicable to cases where both coasts belong to one and the same coastal state. If, as a consequence of this delimitation, an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may be declared by the coastal state to form part of its territorial sea.

4. The line of demarcation shall be marked on the officially recognized large-scale charts.

Commentary

(1) The 1955 draft contained an article (12) entitled "Delimitation of the territorial sea in straits," and another (14) entitled "Delimitation of the territorial sea of two states, the coasts of which are opposite each other." It was correctly pointed out that the text could be simplified by combining those two articles, since the delimitation of the territorial sea in straits did not present any different problem from that of the opposite coasts of two states generally. It is only the right of passage in straits that calls for special attention. The Commission has dealt with this in Article 17, paragraph 4.

(2) The delimitation in case of disagreement between those states, of the territorial seas between two states the coasts of which are opposite each other, was one of the main tasks of the committee of experts which met at The Hague in April 1953 at the Commission's request. The Commission approved of the experts' proposals (A/CN.4/61/Add.1) and took them as a basis for this article. It considered, however, that it would be wrong to go into too much detail and that the rule should be fairly flexible. Consequently, it did not adopt certain points of detail laid down by the experts. Although the Commission noted that special circumstances would probably necessitate frequent departures from the mathematical median line, it thought it advisable to adopt, as a general rule, the system of the median line as a basis for delimitation.

(3) Under the term "baselines" at the end of paragraph 1 the Commission includes both normal baselines and those applied under any straight baseline system adopted for the coast in question.

(4) The second paragraph deals with cases where parts of the high sea may be surrounded by the territorial seas of the two states. It was thought

that there was no valid reason why these enclosed portions of sea—which may be quite large in area—should not be treated as high seas. If such areas are very small, however, their assimilation to the territorial sea may be justified on practical grounds. Such exceptions will be limited to enclaves of sea not more than two miles across, this being the width fixed by the Commission following the example of the 1930 Codification Conference, though it is not claimed that there is any existing rule of positive law to this effect.

(5) If both shores belong to the same state, the question of delimitation of the territorial sea can only arise if the distance between the two shores is more than twice the breadth of the territorial sea. The first sentence of paragraph 2 will then apply. In this case the question of enclaves may also arise. The enclave may then be assimilated to the territorial sea if it is not more than two miles across.

(6) The Commission is aware that the rules it has formulated in paragraphs 2 and 3 cannot be applied in all circumstances. Cases may arise in which, either by reason of differences in customary law or by reason of international conventions, it is necessary to apply a different rule to the sea between the two coasts. It is not impossible that the area of sea between two coasts of the same state may have the character of an internal sea subject to special rules. The Commission cannot undertake to study these special cases; it must confine itself to stating the principles which, in general, could serve as a point of departure for determining the legal status of the areas in question.

(7) The rule established by the present article does not provide any solution for cases in which the states opposite each other have adopted different breadths for their territorial seas. As long as no agreement is reached on the breadth of the territorial sea, disputes of this kind cannot be settled on the basis of legal rules; they must be settled by agreement between the parties.

Delimitation of the territorial sea at the mouth of a river

ARTICLE 13

1. If a river flows directly into the sea, the territorial sea shall be measured from a line drawn *inter fauces terrarum* across the mouth of the river.

2. If the river flows into an estuary the coasts of which belong to a single state, Article 7 shall apply.

Commentary

The substance of this article is taken from the Report of Sub-Committee II of the Second Committee of the Hague Conference of 1930 for the Codification of International Law. So far as paragraph 2 is concerned, the Commission has not the necessary geographical data at its disposal to decide whether this provision is applicable to all existing estuaries.

Delimitation of the territorial sea of two adjacent states

ARTICLE 14

1. The boundary of the territorial sea between two adjacent states shall be determined by agreement between them. In the absence of such agreement, and unless another boundary line is justified by special circumstances, the boundary is drawn by application of the principle of equidistance from the nearest points on the baseline from which the breadth of the territorial sea of each country is measured.

2. The boundary line shall be marked on the officially recognized large-scale charts.

Commentary

(1) The situation described in this article can be regulated in various ways.

(2) First, it would be possible to consider extending the land frontier out to sea as far as the outer limit of the territorial sea. This line can only be used if the land frontier meets the coast at a right angle; if the angle is acute, the result is impracticable.

(3) A second solution would be to draw a line at right angles to the coast at the point where the land frontier reaches the sea. This method is open to criticism if the coastline curves in the vicinity of the point in question; for in that case the line drawn at right angles may meet the coast again at another point.

(4) A third solution would be to adopt as the demarcation line the geographical parallel passing through the point at which the land frontier meets the coast. This solution is not applicable in all cases either.

(5) A fourth solution would be to draw a line at right angles to the general direction of the coastline. The Norwegian and Swedish Governments drew attention to the arbitral award of 23 October 1909 in a dispute between Norway and Sweden, of which the statement of reasons contained the following sentence:

“The delimitation shall be made by tracing a line perpendicularly to the general direction of the coast.” (A/CN.4/71, p. 14 and A/CN.4/71/Add.1, p. 3).

(6) The group of experts, mentioned above, was unable to support this last method of drawing the boundary line. It was of opinion that it was often impracticable to establish any “general direction of the coast”; the result would depend on the “scale of the charts used for the purpose and . . . how much coast shall be utilized in attempting to determine any general direction whatever.” Consequently, since the method of drawing a line at right angles to the general direction of the coastline is too vague for purposes of law, the best solution seems to be the median line which the group of experts suggested. Such a line should be drawn according to the principle of equidistance from the respective coastlines. Where the coast is straight, a line drawn according to this method will coincide with

one drawn at right angles to the coast at the intersection of the land frontier and the coastline. If, however, the coast is curved or irregular, the line takes the contour into account, while avoiding the difficulties of the problem of the general direction of the coast.

(7) The Commission agreed with the view taken by the group of experts. As in the case dealt with by the preceding article, however, it considers that the rule should be very flexibly applied.

SECTION III. RIGHT OF INNOCENT PASSAGE

(1) This section contains four subsections: subsection A. General rules; subsection B. Merchant ships; subsection C. Government ships other than warships; subsection D. Warships. The general rules laid down in subsection A are fully applicable to merchant ships (subsection B). They apply to the ships referred to in subsections C and D subject to the reservations stated there.

(2) The Commission wishes to point out that this section, like the whole of these regulations, is applicable only in time of peace. No provision of this section affects the rights and obligations of Members of the United Nations Organization under the Charter.

SUBSECTION A. GENERAL RULES

Meaning of the right of innocent passage

ARTICLE 15

1. Subject to the provisions of the present rules, ships of all states shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage is innocent so long as a ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal state or contrary to the present rules, or to other rules of international law.

4. Passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

5. Submarines are required to navigate on the surface.

Commentary

(1) This article lays down that ships of all states, including fishing boats, have the right of innocent passage through the territorial sea. It reiterates a principle recognized by international law and confirmed by the 1930 Codification Conference.

(2) According to paragraph 2 the general rule recommended for ships

passing through the territorial sea is equally applicable to ships proceeding to or from ports. In the latter cases, however, certain restrictions are necessary: these are mentioned in Article 17, paragraph 2, Article 20, paragraph 2 and Article 21, paragraph 3.

(3) For the right in question to be claimable, passage must in fact be innocent. It will not be innocent if the ship commits any of the acts referred to in paragraph 3. This paragraph follows the lines of that included in Article 5 of the rules proposed by the Second Committee of the 1930 Codification Conference. The Commission considered that "fiscal interests of the State"—a term which, according to the 1930 comments, should be interpreted very broadly as including all matters relating to customs and to import, export and transit prohibitions—could be regarded as being included in the more general expression used in paragraph 3. This expression covers, *inter alia*, questions relating to customs and health as well as the interests enumerated in the comment to Article 18.

(4) Paragraph 3 contains only general criteria and does not go into details. There was therefore no need to mention the case—to which attention has been specifically drawn—of ships using the territorial sea for the express purpose of defeating import and export controls and contravening the customs regulations of the coastal state ("hovering ships"). The Commission considers, however, that passage undertaken for this purpose cannot be regarded as innocent.

(5) Under the 1955 draft, the provision in paragraph 5 was inserted in the subsection on warships. It has been transferred to the general subsection in order to make it equally applicable to commercial submarines, if these ships are ever re-introduced.

Duties of the coastal state

ARTICLE 16

1. The coastal state must not hamper innocent passage through the territorial sea. It is required to use the means at its disposal to ensure respect for innocent passage through the territorial sea and must not allow the said sea to be used for acts contrary to the rights of other states.

2. The coastal state is required to give due publicity to any dangers to navigation of which it has knowledge.

Commentary

(1) This article confirms the principles which were upheld by the International Court of Justice in its judgement of 9 April 1949 in the Corfu Channel Case between the United Kingdom and Albania.

(2) If they hamper innocent passage, installations intended for the exploitation of the seabed and subsoil of the territorial sea must not be sited [*sic*] in narrow channels or in sea lanes forming part of the territorial sea and essential for international navigation.

Rights of protection of the coastal state

ARTICLE 17

1. The coastal state may take the necessary steps in its territorial sea to protect itself against any act prejudicial to its security or to such other of its interests as it is authorized to protect under the present rules and other rules of international law.

2. In the case of ships proceeding to internal waters, the coastal state shall also have the right to take the necessary steps to prevent any breach of the conditions to which the admission of those ships to those waters is subject.

3. The coastal state may suspend temporarily in definite areas of its territorial sea the exercise of the right of passage if it should deem such suspension essential for the protection of the rights referred to in paragraph 1. Should it take such action, it is bound to give due publicity to the suspension.

4. There must be no suspension of the innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas.

Commentary

(1) This article recognizes the right of the coastal state to verify the innocent character of the passage, if need should arise, and to take the necessary steps to protect itself against any act prejudicial to its security or to such other of its interests as it is authorized to protect under the present rules and other rules of international law. The Second Committee of the 1930 Codification Conference used the expression "public order" in this context. The Commission prefers to avoid this expression, which is open to various interpretations.

(2) In exceptional cases a temporary suspension of the right of passage is permissible if compelling reasons connected with general security require it. Although it is arguable that this power was in any case implied in paragraph 1 of the article, the Commission considered it desirable to mention it expressly in a third paragraph which specifies that only a temporary suspension in definite areas is permissible. The Commission is of the opinion that the article states the international law in force.

(3) The Commission also included a clause formally prohibiting interference with passage through straits used for navigation between two parts of the high seas. The expression "straits normally used for international navigation between two parts of the high seas" was suggested by the decision of the International Court of Justice in the Corfu Channel Case. The Commission, however, was of the opinion that it would be in conformity with the Court's decision to insert the word "normally" before the word "used."

(4) The question was asked what would be the legal position of straits forming part of the territorial sea of one or more states and constituting the sole means of access to a port of another state. The Commission con-

siders that this case could be assimilated to that of a bay whose inner part and entrance from the high seas belong to different states. As the Commission felt bound to confine itself to proposing rules applicable to bays, wholly belonging to a single coastal state, it also reserved consideration of the above-mentioned case.

Duties of foreign ships during their passage

ARTICLE 18

Foreign ships exercising the right of passage shall comply with the laws and regulations enacted by the coastal state in conformity with the present rules and other rules of international law and, in particular, with the laws and regulations relating to transport and navigation.

Commentary

(1) International law has long recognized the right of the coastal state to enact, in the general interest of navigation, special regulations applicable to ships exercising the right of passage through the territorial sea.

(2) Ships entering the territorial sea of a foreign state remain under the jurisdiction of the flag state. Nevertheless, the fact that they are in waters under the sovereignty of another state imposes some limitation on the exclusive jurisdiction of the flag state. Such ships must comply with the laws and regulations enacted by the coastal state in conformity with the present rules and other rules of international law and, in particular, with the laws and regulations relating to transport and navigation. At its seventh session, the Commission thought it useful to give the following examples:

- (a) The safety of traffic and the protection of channels and buoys;
- (b) The protection of the waters of the coastal state against pollution of any kind caused by ships;
- (c) The conservation of the living resources of the sea;
- (d) The rights of fishing and hunting and analogous rights belonging to the coastal state;
- (e) Any hydrographical survey.

(3) At the eighth session, a proposal was made for the addition of the following to this list: use of the national flag, use of the route prescribed for international navigation and observance of rules relating to security and of customs and health regulations. The Commission considered that such a list, which could not be exhaustive, would be somewhat arbitrary and preferred to mention these cases in the commentary without including them in the body of the article.

(4) The corresponding article drafted by the Second Committee of the 1930 Conference contained a second paragraph reading:

“The coastal State may not, however, apply these rules or regulations in such a manner as to discriminate between foreign vessels of different nationalities, nor, save in matters relating to fishing and shooting, between national vessels and foreign vessels.”

(5) By omitting this paragraph, the Commission did not mean to imply that it does not contain a general, established rule of international law. The Commission considers, however, that cases may occur in which special rights granted by one state to another given state may be fully justified by the special relationship between the two states, and that in the absence of treaty provisions to the contrary, the grant of such rights cannot be invoked by other states as a ground for claiming similar treatment. The Commission prefers, therefore, that this question should continue to be governed by the general rules of law.

SUBSECTION B. MERCHANT SHIPS

Charges to be levied upon foreign ships

ARTICLE 19

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may only be levied upon a foreign ship passing through the territorial sea as payment for specific services rendered to the ship.

Commentary

(1) The purpose of this article is to bar any charges in respect of general services to shipping (light or buoyage dues, etc.) and to allow payment to be demanded only for special services rendered to the ship (pilotage, towage, etc.).

(2) It is, of course, understood that special rights in this connexion may be recognized in international conventions.

(3) As a general rule, these charges should be levied on terms of equality. For reasons analogous to those given for the omission from Article 18 of the 1930 paragraph mentioned at the end of the comment on that article, the Commission did not include in Article 19 the words "these charges shall be levied without discrimination" which occurred in the corresponding article drafted by the 1930 Conference.

(4) A proposal was made that the following clause be added to paragraph 2: "The right of the coastal state to demand and obtain information on the nationality, tonnage, destination and provenance of passing vessels in order to facilitate the levying of charges is reserved." The Commission was unwilling to insert in the article a clause which, if injudiciously applied, might seriously interfere with the passage of ships. But the Commission has no wish to dispute the fact that, in certain circumstances, the coastal state may be entitled to ask for the above-mentioned information. Any unjustifiable interference with navigation must, however, be avoided.

Arrest on board a foreign ship

ARTICLE 20

1. A coastal state may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct

any investigation by reason of any crime committed on board the ship during its passage, save only in the following cases:

- (a) If the consequences of the crime extend beyond the ship; or
- (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
- (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies.

2. The above provisions do not affect the right of the coastal state to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship lying in its territorial sea or passing through the territorial sea after leaving internal waters.

3. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation.

Commentary

(1) This article enumerates the cases in which the coastal state may stop a foreign ship passing through its territorial sea for the purpose of arresting persons or conducting an investigation in connexion with a criminal offence committed on board the ship during the said passage. In such a case a conflict of interests occurs; on the one hand, there are the interests of shipping, which should suffer as little interference as possible; on the other hand, there are the interests of the coastal state, which wishes to enforce its criminal law throughout its territory. The coastal state's authority to bring the offenders before its courts (if it can arrest them) remains undiminished, but its power to arrest persons on board ships which are merely passing through the territorial sea is limited to the cases enumerated in the article.

(2) The coastal state has no authority to stop a foreign ship passing through the territorial sea without entering internal waters merely because some person happens to be on board who is wanted by the judicial authorities of that state in connexion with some punishable act committed elsewhere than on board the ship. *A fortiori*, a request for extradition addressed to the coastal state by reason of an offence committed abroad cannot be considered a valid reason for stopping the ship.

(3) In the case of a ship lying in the territorial sea, the jurisdiction of the coastal state should be regulated by the state's own municipal law. Such jurisdiction is more extensive than in the case of ships which are simply passing through the territorial sea along the coast. This applies also to ships which have called at a port or left a navigable waterway in the coastal state; the fact that a ship has moored in a port and had contact with the land, taken on passengers, etc., increases the coastal state's powers in this respect. But the coastal state must always do its utmost to interfere as little as possible with navigation. The inconvenience caused to navigation by the stopping of a large liner outward bound in order to arrest a person alleged to have committed some minor offence ashore cannot be regarded as of less importance than the interest which the state

may have in securing the arrest of the offender. Similarly, the judicial authorities of the coastal state should, as far as possible, refrain from arresting any of the officers or crew of the ship if their absence would make it impossible for the voyage to continue.

(4) Thus the proposed article does not attempt to solve conflicts of jurisdiction between the coastal state and the flag state in the matter of criminal law, nor does it in any way prejudice their respective rights. The Commission is fully aware of the desirability of codifying the law relating to these matters. It appreciates in particular that it would be useful to determine what court is competent to deal with any criminal proceedings arising out of collisions in the territorial sea. Nevertheless, following the example set by the 1930 Conference, the Commission refrained from formulating specific rules on this subject, because it felt that in this very broad field certain limits must inevitably be set to its work. Another reason for the Commission's not dealing with the matter of collisions is the existence since 1952 of a convention on the subject, which has not yet been ratified by many states, namely the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions or Other Incidents of Navigation, signed at Brussels on 10 May 1952.

(5) The question was raised whether the coastal state is entitled to make an arrest when the consequences of the crime, although extending beyond the ship, are limited to the territory of the flag state. The Commission did not feel that this case warranted making an exception to the rule in subparagraph (a) of paragraph 1. It is obvious that, particularly in such cases, the coastal state must act very warily, but it may well be that sometimes in these cases the arrest would also be in the interests of the flag state; hence, it would not be justifiable to forbid the coastal state to intervene.

(6) An arrest for the purpose of suppressing illicit traffic in narcotic drugs may be justifiable, if the condition in subparagraph (a) is fulfilled.

Arrest of ships for the purpose of exercising civil jurisdiction

ARTICLE 21

1. A coastal state may not arrest or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

2. A coastal state may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal state.

3. The provisions of the previous paragraph are without prejudice to the right of the coastal state, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea or passing through the territorial sea after leaving the internal waters.

Commentary

(1) The Commission followed a rule analogous to that adopted for the exercise of criminal jurisdiction. A ship which is only passing through the territorial sea without entering internal waters may in no circumstances be stopped for the purpose of exercising civil jurisdiction in relation to any person on board; nor may the ship itself be arrested or seized except as a result of events occurring in the waters of the coastal state during the voyage in question, as for example, a collision, a salvage operation, etc., or in respect of obligations incurred for the purpose of the voyage.

(2) The article does not attempt to provide a general solution for conflicts of jurisdiction under private law between the coastal state and the flag state. Questions of this kind will have to be settled in accordance with the general principles of private international law and cannot be dealt with by the Commission in this report. Hence, questions of competence with regard to liability under civil law for collisions in the territorial sea are not covered by this article.

(3) At its sixth session, the Commission had inserted in this article a provision concerning the coastal state's right to levy execution against, or to arrest for the purpose of civil proceedings, ships passing through the territorial sea. Certain governments pointed out that there was a discrepancy between the rules adopted by the Commission and those of the Brussels Convention of 10 May 1952 for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships. This convention gives a longer list of cases in which arrest is permitted than the Commission's 1954 draft, which had followed the example of the Hague Conference of 1930 for the Codification of International Law. At its seventh session, the Commission felt it should adopt the rules of the Brussels Convention, not only because unification is needed on this point but also because the rules of the convention, which are more recent than those drawn up in 1930, were prepared and framed with great care by the maritime law experts of a large number of maritime states. For this reason the Commission attempted to bring the article into line with the provisions of the Brussels Convention.

(4) The new wording, however, did not satisfy a number of governments. It was pointed out that to attempt to summarize the convention in the draft articles by extracting brief passages from it would probably create even greater difficulties on account of the lack of uniformity which might arise between the terms of the summary inserted in the rules and the convention itself, in view of the impossibility of dealing with the whole substance of the convention in the rules. The Commission recognized the soundness of that comment. In addition, certain members pointed out that the Brussels Convention, which recognizes the right of arrest in many more cases than the Commission had done in its 1954 draft, affected innocent passage to what seemed an unjustifiable extent. Possibly the Brussels Convention, which regulated arrest within the full jurisdiction of the state, had been directed more to arrest in port than to arrest during

passage through the territorial sea. The majority of the Commission were of opinion that the 1954 text should be restored. They did not feel it advisable to leave the question in abeyance, as certain members had suggested, for they considered that the proposed rules would then be marred by a gap detrimental to international navigation. Even admitting that the authors of the 1952 Brussels Convention had wished to increase the number of cases in which the coastal state is entitled to exercise its civil jurisdiction over foreign ships merely passing through the territorial sea without entering a port, the existence of different rules on this point could hardly be regarded as a bar to the adoption of the above-mentioned provision since the Brussels Convention would bind only the contracting parties in their mutual relations.

(5) If, on the other hand, a foreign vessel lies in the territorial sea or passes through it after leaving the internal waters, the coastal state has far wider powers. It is then entitled, in accordance with its laws, to levy execution against or to arrest the ship for the purpose of any civil proceedings.

SUBSECTION C. GOVERNMENT SHIPS OTHER THAN WARSHIPS

Government ships operated for commercial purposes

ARTICLE 22

The rules contained in subsections A and B shall also apply to government ships operated for commercial purposes.

Commentary

(1) The Commission followed the rules of the Brussels Convention of 1926 concerning the Immunity of Government Ships. It considered that these rules followed the preponderant practice of states and it therefore formulated Article 22 accordingly.

(2) Certain members felt unable to accept the rules of the Brussels Convention and opposed this article.

Government ships operated for non-commercial purposes

ARTICLE 23

The rules contained in subsection A shall apply to government ships operated for non-commercial purposes.

Commentary

The question of the application of subsection D to government ships operated for non-commercial purposes is left in abeyance. The Commission, not wishing on this occasion to settle in detail the status of this category of ships, left in abeyance the question whether they should be assimilated, entirely or in certain respects, to warships. In so doing, the Commission followed the example of the Hague Conference of 1930 for the Codification of International Law.

SUBSECTION D. WARSHIPS

Passage

ARTICLE 24

The coastal state may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of Articles 17 and 18.

Commentary

(1) At its sixth session in 1954, the Commission took the view that passage should be granted to warships without prior authorization or notification. At its seventh session in 1955, after noting the comments of certain governments and reviewing the question, the Commission felt obliged to amend this article so as to stress the right of the coastal state to make the right of passage of warships through the territorial sea subject to previous authorization or notification. Where previous authorization is required, it should not normally be subject to conditions other than those laid down in Articles 17 and 18. In certain parts of the territorial sea, or in certain special circumstances, the coastal state may, however, deem it necessary to limit the right of passage more strictly in the case of warships than in that of merchant ships. The 1955 article provides a clearer recognition of this right than the 1954 text.

(2) The Commission reconsidered this matter at its eighth session, in the light of the comments of certain governments, which pointed out that in practice passage was effected without formality and without objection on the part of coastal states. The majority of the Commission, however, saw no reason to change its view. While it is true that a large number of states do not require previous authorization or notification, the Commission can only welcome this attitude, which displays a laudable respect for the principle of freedom of communications, but this does not mean that a state would not be entitled to require such notification or authorization if it deemed it necessary to take this precautionary measure. Since it admits that the passage of warships through the territorial sea of another state can be considered by that state as a threat to its security, and is aware that a number of states do require previous notification or authorization, the Commission is not in a position to dispute the right of states to take such a measure. But so long as a state has not enacted—and duly published—a restriction upon the right of passage of foreign warships through its territorial sea, such ships may pass through those waters without previous notification or authorization provided that they do not lie in them or put in at a port. In these latter cases previous authorization—except in cases of putting in through stress of weather—is always required. The Commission did not consider it necessary to insert an express stipulation to this effect since Article 15, paragraph 4, applies equally to warships.

(3) The right of the coastal state to restrict passage is more limited in the case of passage through straits. The International Court of Justice in its judgement of 9 April 1949 in the Corfu Channel Case says:

“It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.”¹⁵

(4) The Commission relied on that judgement of the Court when inserting in the 1955 draft, a second paragraph worded as follows:

“It may not interfere in any way with innocent passage through straits normally used for international navigation between two parts of the high seas.”¹⁶

It was pointed out at the eighth session that this second paragraph was unnecessary, as paragraph 4 of Article 17, which forms part of subsection A entitled “General Rules,” was applicable to warships. The majority of the Commission supported the view that the second paragraph of the article included in 1955 was not strictly necessary. In deleting this paragraph the Commission, in order to avoid any misunderstanding on the subject, nevertheless wishes to state that Article 24, in conjunction with paragraph 4 of Article 17, must be interpreted to mean that the coastal state may not interfere in any way with the innocent passage of warships through straits normally used for international navigation between two parts of the high seas; hence the coastal state may not make the passage of warships through such straits subject to any previous authorization or notification.

(5) The article does not affect the rights of states under a convention governing passage through the straits to which it refers.

Non-observance of the regulations

ARTICLE 25

If any warship does not comply with the regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance which may be brought to its notice, the coastal state may require the warship to leave the territorial sea.

Commentary

The article indicates the course to be followed by the coastal state in the event of failure to observe the regulations of the coastal state.

¹⁵ I.C.J. Reports, 1949, p. 28.

¹⁶ Official Records of the General Assembly, 10th Sess., Supp. No. 9 (A/2934), p. 22.

PART II. HIGH SEAS

SECTION I. GENERAL RÉGIME

Definition of the high seas

ARTICLE 26

1. The term "high seas" means all parts of the sea that are not included in the territorial sea, as contemplated by Part I, or in the internal waters of a state. •

2. Waters within the baseline of the territorial sea are considered "internal waters."

Commentary

(1) The waters of the sea belong either to the high seas or to the territorial sea or to internal waters. In that part of these articles which deals with the territorial sea, the Commission has attempted to define the external limits of the territorial sea and has indicated the baselines from which it should be measured. Waters within these baselines are internal waters, over which, subject to the provisions of international law limiting the rights of the state—particularly as regards ports and international waterways—the state exercises its sovereignty in the same way as over the land.

(2) Some large stretches of water, entirely surrounded by dry land, are known as "lakes," others as "seas." The latter constitute internal seas, to which the régime of the high seas is not applicable. Where such stretches of water communicate with the high seas by a strait or arm of the sea, they are considered as "internal seas" if the coasts, including those of the waterway giving access to the high seas, belong to a single state. If that is not the case, they are considered as high seas. These rules may, however, be modified for historical reasons or by international arrangement.

Freedom of the high seas

ARTICLE 27

The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty. Freedom of the high seas comprises, *inter alia*:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

Commentary

(1) The principle generally accepted in international law that the high seas are open to all nations governs the whole regulation of the subject. No state may subject any part of the high seas to its sovereignty; hence no state may exercise jurisdiction over any such stretch of water. States are bound to refrain from any acts which might adversely affect the use of

the high seas by nationals of other states. Freedom to fly over the high seas is expressly mentioned in this article because the Commission considers that it follows directly from the principle of the freedom of the sea; the Commission has, however, refrained from formulating rules on air navigation, since the task it set itself in the present phase of its work is confined to the codification and development of the law of the sea.

(2) The list of freedoms of the high seas contained in this article is not restrictive. The Commission has merely specified four of the main freedoms, but it is aware that there are other freedoms, such as freedom to undertake scientific research on the high seas—a freedom limited only by the general principle stated in the third sentence of paragraph 1 of the commentary to the present article. The Commission has not made specific mention of the freedom to explore or exploit the subsoil of the high seas. It considered that apart from the case of the exploitation or exploration of the soil or subsoil of a continental shelf—a case dealt with separately in Section III below—such exploitation had not yet assumed sufficient practical importance to justify special regulation.

(3) Nor did the Commission make any express pronouncement on the freedom to undertake nuclear weapon tests on the high seas. In this connexion the general principle enunciated in the third sentence of paragraph 1 of this commentary is applicable. In addition, the Commission draws attention to Article 48, paragraphs 2 and 3, of these articles. The Commission did not, however, wish to prejudge the findings of the Scientific Committee set up under General Assembly resolution 913 (X) of 3 December 1955 to study the effects of atomic radiation.

(4) The term "submarine cables" applies not only to telegraph and telephone cables, but also to high-voltage power cables.

(5) Any freedom that is to be exercised in the interests of all entitled to enjoy it, must be regulated. Hence, the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community. These rules concern particularly:

(i) The right of states to exercise their sovereignty on board ships flying their flag;

(ii) The exercise of certain policing rights;

(iii) The rights of states relative to the conservation of the living resources of the high seas;

(iv) The institution by a coastal state of a zone contiguous to its coast for the purpose of exercising certain well-defined rights;

(v) The rights of coastal states with regard to the continental shelf.

(6) These matters form the subject of the present articles.

SUBSECTION A. NAVIGATION

The right of navigation

ARTICLE 28

Every state has the right to sail ships under its flag on the high seas.

Commentary

See commentaries to Articles 29 and 30.

Nationality of ships

ARTICLE 29

1. Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the national character of the ship by other states, there must exist a genuine link between the state and the ship.

2. A merchant ship's right to fly the flag of a state is evidenced by documents issued by the authorities of the state of the flag.

Commentary

(1) Each state lays down the conditions on which ships may fly its flag. Obviously the state enjoys complete liberty in the case of ships owned by it or ships which are the property of a nationalized company. With regard to other ships, the state must accept certain restrictions. As in the case of the grant of nationality to persons, national legislation on the subject must not depart too far from the principles adopted by the majority of states, which may be regarded as forming part of international law. Only on that condition will the freedom granted to states not give rise to abuse and to friction with other states. With regard to the national element required for permission to fly the flag, a great many systems are possible, but there must be a minimum national element.

(2) On this principle, the Institute of International Law, as long ago as 1896, adopted certain rules governing permission to fly the flag. At its seventh session the Commission deemed these rules acceptable in slightly amended form, while realizing that, if the practical ends in view were to be achieved, states would have to work out more detailed provisions when incorporating these rules in their legislation.

(3) At its eighth session, the Commission, after examining the comments of governments, felt obliged to abandon this viewpoint. It came to the conclusion that the criteria it had formulated could not fulfil the aim it had set itself. Existing practice in the various states is too divergent to be governed by the few criteria adopted by the Commission. Regulations of this kind would be bound to leave a large number of problems unsolved and could not prevent abuse. The Commission accordingly thought it best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognized, there must be a genuine link between the ship and the state granting permission to fly its flag. The Commission does not consider it possible to state in any greater detail what form this link should take. This lack of precision made some members of the Commission question the advisability of inserting such a stipulation. But the majority of the Commission preferred

a vague criterion to no criterion at all. While leaving states a wide latitude in this respect, the Commission wished to make it clear that the grant of its flag to a ship cannot be a mere administrative formality, with no accompanying guarantee that the ship possess a real link with its new state. The jurisdiction of the state over ships, and the control it should exercise in conformity with Article 34 of these articles, can only be effective where there exists in fact a relationship between the state and the ship other than mere registration or the mere grant of a certificate of registry.

(4) Paragraph 2 has been added so that the nationality can be proved in case of doubt.

(5) The question was raised whether the United Nations, and possibly other international organizations also, should be recognized as having the right to sail ships exclusively under their own flags. The Commission fully recognized the importance of this question. Member states will obviously respect the protection exercised by the United Nations over a ship in cases where the competent organ has authorized the ship to fly the United Nations flag. But it must not be forgotten that the legal system of the flag state applies to the ship authorized to fly the flag. In this respect, the flag of the United Nations or of another international organization cannot be assimilated to the flag of a state. The Commission had instructed the special rapporteur to submit a report on the subject. In his report (A/CN.4/103) the special rapporteur proposes that consideration be given to the following measures:

(a) The Members of the United Nations would recognize a special United Nations registration entitling the ship to fly the United Nations flag and to special protection by the United Nations;

(b) The Secretary-General of the United Nations would be authorized to conclude, as occasion may require, a special agreement with one or more Member States by which such Member States would allow the ships concerned to fly their flag in combination with the United Nations flag;

(c) The Members of the United Nations would undertake, in a general agreement, to extend their legislation to ships concerning which a special agreement between them and the Secretary-General, as referred to in subparagraph (b), has been concluded, and to assimilate such ships to their own ships, insofar as that would be compatible with the United Nations' interests;

(d) The Members of the United Nations would declare in the same general agreement that they recognize the special agreements between the Secretary-General and other Members of the United Nations, referred to in subparagraph (b), and that they extend to the United Nations all international agreements relating to navigation to which they are a party.

(6) The Commission, after discussion, merely took note of these proposals. Having regard to the diversity of the problems raised by this question, the Commission was unable to take a decision. It has, however, inserted these proposals in its report, since it regards them as useful material for any subsequent study of the problem.

Status of ships

ARTICLE 30

Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

Commentary

(1) The absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single state and that it is subject to the jurisdiction of that state.

(2) In certain cases, policing rights have been granted to warships in respect of foreign ships. Some of these cases are the subject of international treaties, although the regulations contained by the latter cannot yet be regarded as part of general international law. Such of these rights as are recognized in international law are incorporated in the present articles (Articles 43, 46 and 47).

(3) The Commission is aware that changes of flag during a voyage are calculated to encourage the abuses stigmatized by this article. The Commission also realizes that the interests of navigation are opposed to total prohibition of change of flag during a voyage or while in a port of call. In adopting the second sentence of this article, the Commission intended to condemn any change of flag which cannot be regarded as a *bona fide* transaction.

Ships sailing under two flags

ARTICLE 31

A ship which sails under the flags of two or more states, using them according to convenience, may not claim any of the nationalities in question with respect to any other state, and may be assimilated to a ship without nationality.

Commentary

(1) Double nationality may give rise to serious abuse by a ship using one or another flag during the same voyage, according to its convenience. This practice cannot be tolerated. There is a definite school of thought which recognizes the right of other states to regard a ship sailing under two flags as having no proper nationality. In view of the serious disadvantages in this "statelessness" for a ship, this sanction will do much to prevent ships from sailing under two flags and to induce those concerned to take the necessary steps to abandon this irregular practice. The Commission has therefore laid down this rule.

(2) The Commission considered the advisability of also including stipulations as to the rights and obligations of states concerning change of

flag, but reached the conclusion that such regulation would give rise to somewhat complicated problems outside the agreed scope of this initial attempt to codify the law of the sea.

Immunity of warships

ARTICLE 32

1. Warships on the high seas have complete immunity from the jurisdiction of any state other than the flag state.

2. For the purposes of these articles, the term "warship" means a ship belonging to the naval forces of a state and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

Commentary

The principle embodied in paragraph 1 is generally accepted in international law. The definition of the term "warship" has been based on Articles 3 and 4 of the Hague Convention of 18 October 1907 Relating to the Conversion of Merchant Ships into Warships.

Immunity of other government ships

ARTICLE 33

For all purposes connected with the exercise of powers on the high seas by states other than the flag state, ships owned or operated by a state and used only on government service, whether commercial or non-commercial, shall be assimilated to and shall have the same immunity as warships.

Commentary

(1) The Commission discussed the question whether ships used on commercial government service on the high seas could claim the same immunity as warships with respect to the exercise of powers by other states, and answered this question in the affirmative. Although aware of the objections to the granting of immunity to merchant ships used on government service, which led to the denial of this right in the International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, signed at Brussels on 10 April 1926, the Commission held that, as regards navigation on the high seas, there were no sufficient grounds for not granting to state ships used on commercial government service the same immunity as other state ships. The Commission thinks it worth while pointing out that the assimilation referred to in Article 33 concerns only the immunity of ships for the purpose of the exercise of powers by other states, so that there is no question of granting to ships that are not warships policing rights over other ships, exercisable under international law only by warships.

(2) In order to avoid the ships concerned being stopped by warships not informed of their special character, it will be desirable for states, by mutual agreement, to determine the external signs by which that character can be indicated.

Safety of navigation

ARTICLE 34

1. Every state is required to issue for ships under its jurisdiction regulations to ensure safety at sea with regard *inter alia* to:

(a) The use of signals, the maintenance of communications and the prevention of collisions;

(b) The crew, which must be adequate to the needs of the ship and enjoy reasonable labour conditions;

(c) The construction, equipment and seaworthiness of the ship.

2. In issuing such regulations, each state is required to observe internationally accepted standards. It shall take the necessary measures to secure observance of the regulations.

Commentary

(1) In its 1955 provisional articles concerning the régime of the high seas the Commission had confined itself in the matter of safety of navigation at sea to prescribing, in Article 9, rules concerning signals and the prevention of collisions. The Commission's attention has been drawn to the existence of other regulations of great value in promoting safety at sea, and it was suggested that the article be extended to cover these points. The Commission recognized the soundness of this suggestion. Regulations concerning the construction, equipment and seaworthiness of ships, and the labour conditions of crews, can contribute much to the safety of navigation. Objections to the transfer of ships to another flag have often been accentuated by the fact that such regulations, and an effective control over their application, were lacking in the state of the new flag. The Commission accordingly deemed it desirable to insert provisions of this kind in the present article.

(2) These are technical questions which the Commission cannot settle in detail. The Commission's sole aim has been to lay down general principles.

(3) States issuing regulations concerning the use of signals and the prevention of collisions should refrain from prescribing signals and rules which are at variance with those generally applied, and hence likely to cause confusion. Where there is no danger of confusion, certain departures might be admissible if the occasion arose. There is also broad agreement with regard to the construction, equipment and seaworthiness of ships. As regards reasonable labour conditions, the Commission refers to the conventions prepared under the auspices of the International Labour Organisation.

(4) At its seventh session, the Commission took the view that in the matter of safety of life at sea, the interest of each state might be measured

by the number of persons on board its ships, and that shipping tonnage therefore appeared to be the best criterion. At its eighth session, however, the majority of the Commission preferred the more general expression "internationally accepted standards." This expression also covers regulations which are a product of international co-operation, without necessarily having been confirmed by formal treaties. This applies particularly in the case of signals.

Penal jurisdiction in matters of collision

ARTICLE 35

1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag state or of the state of which the accused person is a national.

2. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag state.

Commentary

(1) The Commission thought that no account should be taken for the moment of private international law problems arising out of the question of collision, but considered it essential to determine what tribunal was competent to deal with any penal proceedings arising out of a collision. In view of the judgement rendered by the Permanent Court of International Justice on 7 September 1927 in the "Lotus" case, the Commission felt obliged to take a decision on the subject. This judgement, which was carried by the President's casting vote after an equal vote of six to six, was very strongly criticized and caused serious disquiet in international maritime circles. A diplomatic conference held at Brussels in 1952 disagreed with the conclusions of the judgement. The Commission concurred with the decisions of the conference, which were embodied in the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions and Other Incidents of Navigation, signed at Brussels on 10 May 1952. It did so with the object of protecting ships and their crews from the risk of penal proceedings before foreign courts in the event of collision on the high seas, since such proceedings may constitute an intolerable interference with international navigation. In such a case, proceedings may take place only before the judicial or administrative authorities of the state whose flag was flown by the ship on which the persons in question were serving, or of the state of which they are nationals. In making this latter addition, the Commission adopted the findings of the Brussels Conference in order to enable states to take penal or disciplinary measures against their nationals serving on board foreign vessels who are accused of causing collisions, since in such cases some states wish to be able to prosecute their nationals with a view to

withdrawing the certificates issued to them. The power to withdraw or suspend certificates rests solely with the state which has issued them.

(2) Damage to a submarine telegraph, telephone or high-voltage power cable or to a pipeline (see Article 62) may be regarded as an "incident of navigation," as referred to in paragraph 1 of this article.

Duty to render assistance

ARTICLE 36

Every state shall require the master of a ship sailing under its flag, insofar as he can do so without serious danger to the ship, the crew or the passengers,

(a) To render assistance to any person found at sea in danger of being lost;

(b) To proceed with all speed to the rescue of persons in distress if informed of their need for assistance, insofar as such action may reasonably be expected of him;

(c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

Commentary

The Commission deemed it advisable to include a provision to the effect that ships must render assistance to all persons in danger on the high seas. The Commission has borrowed the terms of Article XI of the Brussels Convention of 23 September 1910 for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, Article 8 of the Convention of the same date for the Unification of Certain Rules of Law with Respect to Collisions between Vessels, and Regulation 10 of Chapter V of the Regulations annexed to the International Convention on the Safety of Life at Sea, of 10 June 1948. In the opinion of the Commission, the article as worded above states the existing international law.

Slave trade

ARTICLE 37

Every state shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its colours, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its colours, shall *ipso facto* be free.

Commentary

The duty of states to prevent and punish the transport of slaves in ships authorized to fly their colours is generally recognized in international law. The General Act of Brussels of 2 July 1890 stipulates that any slave taking refuge on board a warship or a merchant ship shall be free. The

Commission has broadened the wording so as not to exclude government ships other than warships.

Piracy

ARTICLE 38

All states shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.

Commentary

(1) In its work on the articles concerning piracy, the Commission was greatly assisted by the research carried out at the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary, prepared in 1932 under the direction of Professor Joseph Bingham. In general, the Commission was able to endorse the findings of that research.

(2) Any state having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the state must be allowed a certain latitude as to the measures it should take to this end in any individual case.

ARTICLE 39

Piracy consists in any of the following acts:

1. Any illegal act of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or against persons or property on board such a ship;

(b) Against a ship, persons or property in a place outside the jurisdiction of any state.

2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.

3. Any act of incitement or of intentional facilitation of an act described in subparagraph 1 or subparagraph 2 of this article.

Commentary

(1) The Commission had to consider certain controversial points as to the essential features of piracy. It reached the conclusion that:

(i) The intention to rob (*animus furandi*) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain;

(ii) The acts must be committed for private ends;

(iii) Save in the case provided for in Article 40, piracy can be committed only by private ships and not by warships or other government ships;

(iv) Piracy can be committed only on the high seas or in a place situated

outside the territorial jurisdiction of any state, and cannot be committed within the territory of a state or in its territorial sea;

(v) Acts of piracy can be committed not only by ships on the high seas, but also by aircraft, if such acts are directed against ships on the high seas;

(vi) Acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy.

(2) With regard to point (iii), the Commission is aware that there are treaties, such as the Nyon Arrangement of 14 September 1937, which brand the sinking of merchant ships by submarines, against the dictates of humanity, as piratical acts. But it is of the opinion that such treaties do not invalidate the principle that piracy can only be committed by private ships. In view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such ships on suspicion of piracy might involve the gravest consequences. Hence the Commission feels that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community. The Commission was unable to share the view held by some of its members that the principle laid down in the Nyon Arrangement confirmed a new law in process of development. In particular, the questions arising in connexion with acts committed by warships in the service of rival governments engaged in civil war are too complex to make it seem necessary for the safeguarding of order and security on the high seas that all states should have a general right, let alone an obligation, to repress as piracy acts perpetrated by the warships of the parties in question.

(3) As regards point (iv), the Commission considers, despite certain dissenting opinions, that where the attack takes place within the territory of a state, including its territorial sea, the general rule should be applied that it is a matter for the state affected to take the necessary measures for the repression of the acts committed within its territory. In this the Commission is also following the line taken by most writers on the subject.

(4) In considering as "piracy" acts committed in a place outside the jurisdiction of any state, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting *terra nullius* or on the shores of an unoccupied territory. But the Commission did not wish to exclude acts committed by aircraft within a larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction.

(5) With regard to point (v), the Commission feels that acts committed in the air by one aircraft against another aircraft can hardly be regarded as acts of piracy. In any case such acts are outside the scope of these draft articles. However, acts committed by a pirate aircraft against a ship on the high seas may, in the Commission's view, be assimilated to acts committed by a pirate ship.

(6) The view adopted by the Commission in regard to point (vi) tallies with the opinion of most writers. Even where the purpose of the mutineers is to seize the ship, their acts do not constitute acts of piracy.

ARTICLE 40

The acts of piracy, as defined in Article 39, committed by a government ship or a government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private vessel.

Commentary

A state ship or state aircraft whose crew has mutinied and taken control of the ship or aircraft must be assimilated to a private ship or aircraft. Acts committed by the crew or passengers of such a ship against another ship can therefore assume the character of acts of piracy. Clearly, the article ceases to apply once the mutiny has been suppressed and lawful authority restored.

ARTICLE 41

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 39. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Commentary

The purpose of this article is to define the terms "pirate ship" and "pirate aircraft" as used in these articles. The mere fact that a ship sails without a flag is not sufficient to give it the character of a "pirate" ship. Two cases of pirate ships must be distinguished. First, there are ships intended to commit acts of piracy. Secondly, there is the case of ships which have already been guilty of such acts. Such ships can be considered as pirate ships so long as they remain under the control of the persons who have committed those acts.

ARTICLE 42

A ship or aircraft may retain its national character although it has become a pirate ship or aircraft. The retention or loss of national character is determined by the law of the state from which the national character was originally derived.

Commentary

It has been argued that a ship loses its national character by the fact of committing acts of piracy. The Commission does not share this view. Such acts involve the consequences referred to in Article 43. Even though the rule under which a ship on the high seas is subject only to the authority of the flag state no longer applies, the ship keeps the nationality of the state in question, and, subject to the provisions of Article 43, that state can apply its law to the ship in the same way as to other ships flying its flag. A pirate ship should only be regarded as a ship without nationality

where the national laws of the state in question regard piracy as a ground for loss of nationality.

ARTICLE 43

On the high seas or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Commentary

This article gives any state the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts. This right cannot be exercised at a place under the jurisdiction of another state. The Commission did not think it necessary to go into details concerning the penalties to be imposed and the other measures to be taken by the courts.

ARTICLE 44

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the state making the seizure shall be liable to the state the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.

Commentary

This article penalises the unjustified seizure of ships on grounds of piracy. The penalty applies to seizure in the circumstances described in Article 43, and to all acts of interference as mentioned in Article 46 (see the commentary on Article 46), committed on the ground of suspicion of piracy.

ARTICLE 45

A seizure on account of piracy may only be carried out by warships or military aircraft.

Commentary

(1) State action against ships suspected of engaging in piracy should be exercised with great circumspection, so as to avoid friction between states. Hence it is important that the right to take action should be confined to warships, since the use of other government ships does not provide the same safeguards against abuse.

(2) Clearly this article does not apply in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship or to the authorities of a coastal state. This is not a "seizure" within the meaning of this article.

Right of visit

ARTICLE 46

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the ship is engaged in piracy; or

(b) That while in the maritime zones treated as suspect in the international conventions for the abolition of the slave trade, the ship is engaged in that trade; or

(c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in subparagraphs (a), (b) and (c) above, the warship may proceed to verify the ship's title to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

Commentary

(1) The principle of freedom of the seas implies that, generally speaking, a merchant ship can only be boarded on the high seas by a warship flying the same flag. International law, however, admits certain exceptions to this rule, namely, cases where there is reasonable ground for suspecting:

(i) That the ship is a pirate ship;

(ii) That the ship is engaged in the slave trade. The right to visit in this latter case was recognized by the treaties for the repression of slavery, especially the Brussels Act of 2 July 1890. For purposes of repression, this Act assimilated slavery to piracy, with the proviso that the right in question could only be exercised in certain zones clearly defined in the treaties. The Commission felt that it should follow this precedent, so as to ensure that the exercise of the right of control would not be used as a pretext for exercising the right of visit in waters where the slave trade would not normally be expected to exist;

(iii) That the ship is concealing its proper nationality and is in reality of the same nationality as the warship. In this case it is permissible to presume that the ship has committed unlawful acts, and the warship should be at liberty to verify whether its suspicions are justified.

(2) In these three cases the warship is authorized to request a ship not flying a flag to show its colours. If the suspicion is not allayed the warship may proceed to check the ship's papers. To this end it must send a boat

to the suspect ship. As a general rule, the warship may not require the merchant ship to put out a boat to the warship. That would be asking too much of a merchant ship, and a ship's papers must not be exposed unnecessarily to the risk of getting lost. If the examination of the merchant ship's papers does not allay the suspicions, a further examination may be made on board the ship. Such examination must in no circumstances be used for purposes other than those which warranted stopping the vessel. Hence the boarding party must be under the command of an officer responsible for the conduct of his men.

(3) The state to which the warship belongs must compensate the merchant ship for any delay caused by the warship's action, not only where the ship was stopped without reasonable grounds but in all cases where suspicion proves unfounded and the ship committed no act calculated to give rise to suspicion. This severe penalty seems justified in order to prevent the right of visit being abused.

(4) The question arose whether the right to board a vessel should be recognized also in the event of a ship being suspected of committing acts hostile to the state to which the warship belongs, at a time of imminent danger to the security of that state. The Commission did not deem it advisable to include such a provision, mainly because of the vagueness of terms like "imminent danger" and "hostile acts," which leaves them open to abuse. The Commission draws attention in this connexion to its comments on the institution of a contiguous zone for security measures.

Right of hot pursuit

ARTICLE 47

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that state. Such pursuit must be commenced when the foreign ship is within the internal waters or the territorial sea of the pursuing state, and may only be continued outside the territorial sea if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea receives the order to stop, the ship giving the order should likewise be within the territorial sea. If the foreign ship is within a contiguous zone, as defined in Article 66, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third state.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by bearings, sextant angles or other like means, that the ship pursued or one of its boats is within the limits of the territorial sea or, as the case may be, within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraphs 1 to 3 of the present article shall apply *mutatis mutandis*;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship of the coastal state, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself.

6. The release of a ship arrested within the jurisdiction of a state and escorted to a port of that state for the purposes of an enquiry before the competent authorities, may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

Commentary

(1) In the main, this article is taken from Article 11 of the regulations adopted by the Second Committee of the Hague Codification Conference in 1930. The right concerned is not contested in international law. Only certain details as to the exercise of the right call for comment:

(i) It is not necessary that, at the time when the foreign ship within the territorial sea receives the order to stop, the ship giving the order should likewise be within the territorial sea. This rule applies in practice in the case of patrol vessels cruising for police purposes just outside the territorial sea. The essential point is that the ship committing the infringement must be in the territorial sea when the pursuit begins.

(ii) Hot pursuit must be continuous. Once it is broken off it cannot be resumed. The right of hot pursuit in any case ceases as soon as the ship pursued enters the territorial sea of its own country or of a third state.

(iii) Hot pursuit cannot be considered to have begun until the pursuing vessel has spotted the foreign ship in the territorial sea and has ordered it to stop by giving the prescribed signal. To prevent abuse, the Commission declined to admit orders given by wireless, as these could be given at any distance; the words "visual or auditory signal" exclude signals given at a great distance and transmitted by wireless.

(iv) The article also applies to ships which lie outside the territorial sea and cause their boats to commit unlawful acts in that sea. The Commission, however, refused to assimilate to such cases that of a ship staying outside the territorial sea and using, not its own boats, but other craft.

(2) The rules laid down above are all in conformity with those adopted by the Hague Conference. The article adopted by the Commission differs from that of 1930 on two points only:

(a) The majority of the Commission was of the opinion that the right of hot pursuit should also be recognized when the ship is in a zone contiguous to the territorial sea, provided such pursuit is undertaken on the ground of violation of rights for the protection of which the zone was established. Thus, a state which has established a contiguous zone for the purposes of customs control cannot commence hot pursuit of a fishing boat accused of unlawful fishing in the territorial sea if the fishing boat is already in the contiguous zone. Some members of the commission were of the opinion that since the coastal state does not exercise sovereignty in the contiguous zone, no pursuit commenced when the ship is already in the contiguous zone can be recognized. The majority of the Commission did not share that opinion. It admitted, however, that the offences giving rise to hot pursuit must always have been committed in internal waters or in the territorial sea: acts committed in the contiguous zone cannot confer upon the coastal state a right of hot pursuit.

(b) The Commission wished to make it clear that the right of hot pursuit may be exercised only by warships and ships on government service specially authorized by the flag state to that effect. It is quite natural that customs and police vessels should be able to exercise the right of hot pursuit, but there can be no question of government ships on commercial service, for example, claiming that right.

(c) The ship finally arresting the ship pursued need not necessarily be the same as the one which began the pursuit, provided that it has joined in the pursuit and has not merely effected an interception.

(d) The Commission also dealt with the right of hot pursuit of a ship by aircraft. In spite of the dissenting opinions of some of its members, it felt able to recognize the lawfulness of such a practice, provided it is exercised in accordance with the principles governing its exercise by ships. It accordingly made the exercise of an aircraft's right to pursue a ship on the high seas and to arrest it—if necessary in co-operation with a ship—subject to the conditions laid down in paragraph 5. It is essential for the purposes of the proper exercise of the right of hot pursuit that the ship pursued should have been ordered to stop while it was still in the territorial sea or the contiguous zone. The aircraft must be in a position to give a visible and comprehensible signal to that effect; signals by wireless are barred in the case of aircraft also.

(e) It is recommended that the ship or aircraft should establish the position of the ship pursued at the moment when hot pursuit commences; it must wherever possible mark this position by physical means, for example, by dropping a buoy.

(f) The Commission included in this article a case which presents some analogy with the right of hot pursuit and which gave rise to differences of opinion, since it arose after the 1930 Conference. The question was whether a ship pursued and stopped in the territorial sea can be escorted to a port of the state of the pursuing vessel across the high seas, where there is no choice but to pass through the high seas. The Commission considered that it would be illogical to recognize the right of the pursuing vessel to

seize a ship on the high seas and escort it to port across the high seas, while at the same time refusing to the government ship, in respect of a ship already apprehended in the territorial sea, the right to escort it to port across the high seas in cases where special circumstances forced it to leave the territorial sea in order to reach the port.

Pollution of the high seas

ARTICLE 48 .

1. Every state shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation of the seabed and its subsoil, taking account of existing treaty provisions on the subject.

2. Every state shall draw up regulations to prevent pollution of the seas from the dumping of radioactive waste.

3. All states shall co-operate in drawing up regulations with a view to the prevention of pollution of the seas or airspace above, resulting from experiments or activities with radioactive materials or other harmful agents.

Commentary

(1) Water pollution by oil raises serious problems: danger to the life of certain marine species, fish and birds; pollution of ports and beaches; fire risks. Almost all maritime states have laid down regulations to prevent the pollution of their internal waters and their territorial sea by oils discharged from ships. But these special regulations are clearly inadequate. Petroleum products discharged on the high seas may be washed towards the coasts by currents and wind. All states should therefore enact regulations to be observed, even on the high seas, by ships sailing under their flags, and the observance of these regulations should be controlled. It is obvious that only an international solution of the problem can be effective. A conference held in London for the purpose drafted the International Convention for the Prevention of Pollution of the Sea by Oil, 1954. This convention has not yet come into force.

(2) Article 48 stipulates first that states shall draw up regulations which their ships must observe, even on the high seas. Pollution can also be caused by leaks in pipelines or defects in installations for the exploitation of the seabed and its subsoil. All these cases are covered by the stipulation in Article 48.

(3) A new source of pollution of the sea is the dumping of radioactive waste. The Commission considered that such dumping, which may be particularly dangerous for fish and fish eaters, should be put on the same footing as pollution by oil.

(4) Finally, the Commission considered the case of the pollution of the seas or airspace above resulting from experiments or activities with radioactive materials or other harmful agents. In this connexion, it felt that in view of the many-sidedness of the subject and the difficulties besetting any attempt to impose a general prohibition, it should merely provide for

an obligation upon states to co-operate in drawing up regulations with a view to obviating the grave dangers involved. In adopting this provision, the Commission in no way intended to prejudge the findings of the Scientific Committee set up under General Assembly resolution 913 (X) of 3 December 1955 to study the effects of atomic radiation.

SUBSECTION B. FISHING

•*Right to fish*

ARTICLE 49

All states have the right for their nationals to engage in fishing on the high seas, subject to their treaty obligations and to the provisions contained in the following articles concerning conservation of the living resources of the high seas.

Commentary

(1) This article confirms the principle of the right to fish on the high seas. The Commission admitted no exceptions to that principle in the parts of the high seas covering the continental shelf, save as regards sedentary fisheries and fisheries carried on by means of equipment embedded in the sea floor (see Article 60). Nor did it recognize the right to establish a zone contiguous to the coasts where fishing could be exclusively reserved to the nationals of the coastal state. The principle of the freedom of the seas does not, however, preclude regulations governing the conservation of the living resources of the high seas, as recommended by the Commission in Articles 50-59. States may still conclude conventions for the regulation of fishing but the treaty obligations arising out of such conventions are, of course, binding only on the signatory states.

(2) In Articles 49, 51, 52, 53, 54 and 56 the term "nationals" denotes fishing boats having the nationality of the state concerned, irrespective of the nationality of the members of their crews.

Conservation of the living resources of the high seas

(1) At its third session, in 1951, the Commission provisionally adopted, under the title of "Resources of the Sea," articles relating to the conservation of the living resources of the sea. This question was discussed in conjunction with the continental shelf, because certain claims of sovereignty over the waters covering the continental shelf arise, at least in part, out of the coastal state's desire to give effective protection to the living resources of the sea adjacent to its shores.

(2) At its fifth session, in 1953, the Commission reviewed the articles adopted in 1951 in the light of the comments made by certain governments, and thereafter adopted a set of draft articles reproduced in its report on the work of its fifth session.¹⁷

¹⁷ Official Records of the General Assembly, 8th Sess., Supp. No. 9 (A/2456), par. 94.

(3) In adopting these articles, the Commission adhered to the provisional draft of the articles formulated in 1951. It recognized that the existing law on the subject provided no adequate protection of marine fauna against waste or extermination. The above-mentioned report states that the resulting position constitutes, in the first instance, a danger to the food supply of the world. Also, insofar as it renders the coastal state or the states directly interested helpless against wasteful and predatory exploitation of fisheries by foreign nationals, it constitutes an inducement to the state or states in question to resort to unilateral measures of self-protection, which are sometimes at variance with the law as it stands at present, because they result in the total exclusion of foreign nationals.

(4) The articles adopted by the Commission in 1953 were intended to provide the basis for a solution of the difficulties inherent in the existing situation. If the nationals of one state only were engaged in fishing in the areas in question, that state could fully achieve the desired object by adopting appropriate legislation and enforcing its observance. If nationals of several states were engaged in fishing in a given area, the concurrence of those states was essential; Article 1 of the Commission's draft provided therefore that the states concerned would prescribe the necessary measures by agreement. Article 3 of the draft was intended to provide effectively for the contingency of the interested states being unable to reach agreement. It provided that states would be under a duty to accept as binding any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, prescribed as being essential for the purpose of protecting the fishing resources of that area against waste or extermination.

(5) The General Assembly, at its ninth session (resolution 900 (IX) of 14 December 1954), recognized the great importance of the question of the conservation of the living resources of the sea in connexion with the work of the International Law Commission on the régime of the high seas. It decided to convene an international technical conference at the headquarters of the United Nations Food and Agriculture Organization in Rome on 18 April 1955 to study the technical and scientific aspects of the problem of the international conservation of the living resources of the sea. The report of the Conference was to be referred to the International Law Commission "as a further technical contribution to be taken into account in its study of the questions to be dealt with in the final report which it is to prepare pursuant to resolution 899 (IX) of 14 December 1954."

(6) At its seventh session, in 1955, the International Law Commission took note of the report of the Conference¹⁸ with great interest. Mr. García Amador, then Vice-Chairman of the Commission, who had represented the Cuban Government and acted as Deputy Chairman at the Rome Conference, submitted to the Commission a series of draft articles, prefaced by a preamble, to replace the articles approved by the Commission in 1953.

(7) The Commission made a careful study of these draft articles and

¹⁸ See Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, Rome, 18 April-10 May 1955 (A/Conf. 10/6).

found them generally acceptable, although it introduced certain amendments.

(8) The draft articles, as amended, are reproduced as an annex to Chapter II of the Commission's Report on the Work of its Seventh Session.¹⁹ This annex was preceded by a preamble worded as follows:

"The International Law Commission

"Considering that:

"1. The development of modern techniques for the exploitation of the living resources of the sea has exposed some of these resources to the danger of being wasted, harmed or exterminated,

"2. It is necessary that measures for the conservation of the living resources of the sea should be adopted when scientific evidence indicates that they are being or may be exposed to waste, harm or extermination,

"3. The primary objective of conservation of the living resources of the sea is to obtain the optimum sustainable yield so as to obtain a maximum supply of food and other marine products in a form useful to mankind,

"4. When formulating conservation programmes, account should be taken of the special interest of the coastal state in maintaining the productivity of the resources of the high seas contiguous to its coast,

"5. The nature and scope of the problems involved in the conservation of the living resources of the sea are such that there is a clear necessity that they should be solved primarily on a basis of international co-operation through the concerted action of all states concerned, and the study of the experience of the last fifty years and recognition of the great variety of conditions under which conservation programmes have to be applied clearly indicate that these programmes can be more effectively carried out for separate species or on a regional basis,

"Has adopted the following articles:"

(9) The articles are also included as Articles 25-33 in the draft text on the régime of the high seas adopted by the Commission at that session. Articles 25, 26 and 27 broadly reproduce the principles laid down in the first two articles of the 1953 text. The idea of an international body with legislative powers was dropped and replaced by that of compulsory arbitration in case of dispute (Article 31).

(10) From the beginning of its work, the Commission has considered the question whether the position of coastal states as regards measures for the conservation of the living resources in parts of the high seas adjacent to their coasts did not call for some form of recognition by other states. A proposal was submitted in 1951 to the effect that a coastal state should be empowered to lay down conservatory regulations to be applied in such zones, provided any disputes arising out of the application of the regulations were submitted to arbitration. Votes being equally divided on this proposal, the Committee decided to mention it in its report without sponsoring it. The Commission did not include such a provision in its 1953 draft.

¹⁹ Official Records of the General Assembly, 10th Sess., Supp. No. 9 (A/2934) [50 A.J.I.L. 217 (1956)].

(11) At the 1955 Rome Conference, the tendency to make coastal states responsible for controlling zones adjacent to their coasts and applying in them measures of conservation consistent with the general technical principles adopted by the Conference, was again in evidence, and the same idea underlay the proposal submitted to the Commission by Mr. García-Amador at the seventh session. The granting of special rights to coastal states on the ground of their special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to their coasts was linked in that proposal with the obligation to resort to arbitration if the exercise of those rights gave rise to objection by other interested states.

(12) At its seventh session, the Commission adopted two articles—28 and 29—designed to protect the special interests of coastal states. The first of these articles stated that a coastal state having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there. The second article stipulated that a coastal state having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts may adopt unilaterally whatever measures of conservation are appropriate in the area where this interest exists, provided that negotiations with the other states concerned have not led to an agreement within a reasonable period of time and also subject to the provisions of paragraph 2 of Article 29. The two articles provided for compulsory arbitration in the event of differences of opinion between the states concerned.

(13) These two articles in particular gave rise to further discussion in the Commission at its eighth session.

(14) Some members were of the opinion that these articles did not adequately protect the interests of coastal states. They argued that the coastal state, by the mere fact of being coastal, possesses a special interest in maintaining the productivity of the living resources in a part of the area adjacent to its coasts. In their view, this opinion, which was in any case already contained in the preamble to the articles in the annex to Chapter II of the Report on the Work of the Seventh Session, should be clearly expressed in the draft. This opinion was shared by the majority of the Commission, and Articles 28 and 29 were recast. The "special" character of the interest of the coastal state should be interpreted in the sense that the interest exists by reason of the sole fact of the geographical situation. However, the Commission did not wish to imply that the "special" interest of the coastal state would take precedence *per se* over the interests of the other states concerned.

(15) Unlike the 1953 draft, the articles in question contain no express limitation of the breadth of the zone where the coastal state may claim its rights. The fact that the coastal state's right is based on its special interest in maintaining the living resources, implies that any extension of this zone beyond the limits within which such an interest may be supposed to exist would exceed the purpose of the provision.

(16) At its earlier sessions the Commission had used the expression "area of the high seas *contiguous* to its coasts," and the same term was used by the Rome Conference. At its eighth session the Commission, wishing to avoid any confusion with the "contiguous zone" provided for under Article 66 of the present articles, replaced the term "contiguous" in the articles concerning the protection of the living resources of the sea, by "adjacent." This modification does not imply any change in the meaning of the rules adopted.

(17) The insertion of a compulsory arbitration clause was opposed by some members of the Commission at both the seventh and eighth sessions. They expressed the opinion that the Commission, whose task was the codification of law, should not concern itself with safeguards for the application of the rules. In any case, it would be impossible to do so at the present stage, and the study of the question would have to be deferred to later sessions. Other members were of opinion that it would be sufficient, as regards disputes arising from the interpretation and application of the articles concerned, to refer to existing provisions imposing on states an obligation to seek a settlement by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, reference to regional bodies, or other peaceful means, and they made a proposal to insert a provision on this subject in the draft.

(18) The majority of the Commission did not share this view. Without claiming that all rules prepared by the Commission should be accompanied by compulsory jurisdiction or arbitration clauses, it felt that, in proposing for states rights over the high seas going beyond existing international law, the Commission could not rely upon the due functioning of the general rules for the peaceful settlement of disputes, but would have to create effective safeguards for the settlement of disputes by an impartial authority. Hence the majority of the Commission did not wish merely to grant states the rights in question and leave the matter of the settlement of disputes open for future consideration. While recognizing that the settlement of disputes must be sought by the means indicated in the general rule proposed by certain members, it felt that in this matter it would not be enough to have a general clause of that kind which did not guarantee that, if necessary, disputes would in fact be submitted to an impartial authority for decision. For this reason, the majority of the Commission accepted the idea of compulsory arbitration, the procedure for which is laid down in Article 57.

(19) The 1953 proposal to establish a central authority with legislative powers was not adopted; on the other hand, consideration was given to the possibility of setting up a permanent international body within the framework of the United Nations, with the status of a specialized agency, to be responsible not only for making technical and scientific studies of problems concerning the protection and use of living resources of the sea, but also for settling disputes between states on this subject. The Commission is of the opinion that the establishment of an international study commission is worthy of close attention. It considers, however, that in

view of the diversity of the interests which may be involved in such disputes, the idea of *ad hoc* arbitral commissions would have more chance of being carried into practice in the near future than that of a central judicial authority.

(20) Before concluding these introductory remarks the Commission wishes to reiterate its opinion that the proposed measures will fail in an important part of their purpose if they do not help to smooth out the difficulties arising out of exaggerated claims in regard to the extension of the territorial sea or other claims to jurisdiction over areas of the high seas, and thus safeguard the principle of the freedom of the seas.

ARTICLE 50

As employed in the present articles, the expression "conservation of the living resources of the high seas" means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.

Commentary

A clear definition of the expression "conservation of the living resources of the sea" is required. The International Commission for the Northwest Atlantic Fisheries has pointed out that the time is past when the sole concern is conservation of stocks, and that an attempt is now being made to develop useful stocks to beyond their present strength. The Commission accepted the definition given by the International Technical Conference on the Conservation of the Living Resources of the Sea held at Rome in 1955. Paragraph 18 of the Conference's report states that "the principal objective of conservation of the living resources of the seas is to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products." The purport of this definition is further clarified by the preceding paragraph: "The immediate aim of conservation of living marine resources is to conduct fishing activities so as to increase, or at least to maintain, the average sustainable yield of products in desirable form."

ARTICLE 51

A state whose nationals are engaged in fishing in any area of the high seas where the nationals of other states are not thus engaged, shall adopt measures for regulating and controlling fishing activities in that area when necessary for the purpose of the conservation of the living resources of the high seas.

Commentary

(1) The Commission considers it perfectly normal that a state whose nationals are engaged in fishing in any area of the high seas where the nationals of other states are not thus engaged, should be able to prescribe conservation regulations for its nationals and control their observance. There is nothing to prevent a state exercising this right even in an area

adjacent to the coasts of other states whose nationals do not fish there and which have not themselves enacted such regulations. Nevertheless, the existence of such regulations issued by states engaged in fishing does not prevent the coastal state from invoking Article 54 or Article 55.

(2) Conservation regulations under Article 51 must be enacted by the state when necessary. If a non-coastal state which does not engage in fishing in the area but has a special interest in the conservation of the living resources there, considers that such regulations are necessary and that the state in question is not providing them, it can adopt the course indicated in Article 56. In the same circumstances the coastal state could apply Article 54 and, if necessary, Article 55.

ARTICLE 52

1. If the nationals of two or more states are engaged in fishing the same stock or stocks of fish or other marine resources in any area of the high seas, these states shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement the necessary measures for the conservation of such resources.

2. If the states concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by Article 57.

Commentary

(1) To be able to invoke this article, it will not be sufficient for the nationals of a state to engage occasionally in fishing in an area where the nationals of other states also fish; the article only covers the case where two or more states are regularly engaged in fishing in the same area of the high seas. Should the nationals of a state only fish there casually, that state cannot invoke Article 52; but if it has a special interest in conservation in that area, it will be able to invoke Article 56. In making use of the term "regularly," the Commission does not mean to indicate that fishing must be carried on continually: interruptions that can be regarded as natural to the exercise of the fishing in question will not deprive the state concerned of the benefit of this article.

(2) The Commission had specially in mind the case where nationals of different states exploit the same stock of fish or other marine resources. In general, a state should not be entitled to request the opening of negotiations and to initiate arbitral procedure in cases where other states are fishing in the same area but exploiting another stock of fish. It may, however, happen that the conservation measures which one of the states wishes to take would be thwarted by fishing methods applied by the nationals of other states, even though they are exploiting another stock of fish. In that case a request for the opening of negotiations as provided under Article 52 cannot be refused.

(3) The criteria on which the arbitral award provided for under paragraph 2 should be based are enunciated in Article 58. Some members were of the opinion that these criteria should be more precise. The Commission thought it would be sufficient to insert a number of guiding princi-

ples in the commentary to Article 58, to which the Commission draws attention.

ARTICLE 53

1. If, subsequent to the adoption of the measures referred to in Articles 51 and 52, nationals of other states engage in fishing the same stock or stocks of fish or other marine resources in the same area, the conservation measures adopted shall be applicable to them.

2. If these other states do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure contemplated by Article 57. Subject to paragraph 2 of Article 58, the measures adopted shall remain obligatory pending the arbitral decision.

Commentary

(1) It seems to be indicated that newcomers should comply with the regulations in force in the waters where they wish to engage in fishing. If the states of which the newcomers are nationals are not prepared to apply the regulations as they stand, they can open negotiations for their amendment with the states concerned. Failing agreement, the procedure laid down in Article 57 will have to be followed.

(2) The regulations should be applicable to newcomers only if they engage in fishing on a scale which would substantially affect the stock or stocks in question. Any dispute regarding the applicability of the regulations shall be submitted for decision in accordance with Article 57.

(3) In connexion with this article, the Commission considered a proposal that would encourage states to create, build up, or restore productive resources which without special efforts by the interested states would be either destroyed or remain latent or at levels far below their potential productivity. This problem was discussed at the Rome Conference as a special case in connexion with new entrants into a fishery under conservation management. The Report of the Rome Conference stated: "Where opportunities exist for a country or countries to develop or restore the productivity of resources, and where such development or restoration by the harvesting State or States is necessary to maintain the productivity of resources, conditions should be made favourable for such action."²⁰

(4) The report of the Rome Conference also described a procedure now in operation which provides a method for handling this special case. This procedure, under the designation "principle of abstention," was proposed by certain governments for inclusion in the Commission's fishery articles. This proposal provided that:

(a) When states have created, built up, or restored productive resources through the expenditure of time, effort and money on research and management, and through restraints on their own fishermen, and

(b) The continuing and increasing productivity of these resources is the result of and dependent on such action by the participating states, and

²⁰ Report of the International Technical Conference on the Conservation of the Living Resources of the Sea (A/Conf. 10/6), par. 61.

(c) Where the resources are being so fully utilized that an increase in the amount of fishing would not result in any substantial increase in the sustainable yield, then:

(d) States not fishing the resources in recent years, except for the coastal state, should be required to abstain from fishing these stocks as long as these conditions are fulfilled.

(5) The Commission recognized that both this proposal, the purpose of which was to encourage the building up or restoration of the productivity of resources, and the proposals of some other governments, based on the concept of vital economic necessity, may reflect problems and interests which deserve recognition in international law. However, lacking the necessary competence in the scientific and economic domains to study these exceptional situations adequately, the Commission, while drawing attention to the problem, refrained from making any concrete proposal.

ARTICLE 54

1. A coastal state has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

2. A coastal state is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there.

3. If the states concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by Article 57.

Commentary

(1) In the introduction to the articles concerning the conservation of the living resources of the high seas the Commission has already pointed out that it recognizes the special interest of the coastal state in the maintenance of the productivity of the living resources in any part of the high seas adjacent to its territorial sea.

(2) Paragraph 1 of this article contains a stipulation to that effect. Paragraph 2 of the article and Article 55 are based on that idea.

(3) Paragraph 2 recognizes the coastal state's right to take part on an equal footing in any system of research and regulation in the area. Should any doubt arise as to whether a coastal state is justified in asserting a claim to a special interest in areas far removed from its shores, the question would have to be settled by the arbitral procedure contemplated by Article 57.

ARTICLE 55

1. Having regard to the provisions of paragraph 1 of Article 54, any coastal state may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other states concerned have not led to an agreement within a reasonable period of time.

2. The measures which the coastal state adopts under the previous paragraph shall be valid as to other states only if the following requirements are fulfilled:

(a) That scientific evidence shows that there is an urgent need for measures of conservation;

(b) That the measures adopted are based on appropriate scientific findings;

(c) That such measures do not discriminate against foreign fishermen.

3. If these measures are not accepted by the other states concerned, any of the parties may initiate the procedure contemplated by Article 57. Subject to paragraph 2 of Article 58, the measures adopted shall remain obligatory pending the arbitral decision.

Commentary

(1) Article 55 gives a coastal state the right to adopt conservation measures unilaterally, if negotiations with the other states concerned have not led to an agreement within a reasonable period of time. The article specifies the requirements which the measures must fulfil in order to be valid as to other states.

(2) One of the requirements is that the state shall demonstrate the urgent need for the measures. Should there be no such urgent need and the area be one where other states fish, the coastal state will have to adopt the course indicated in Article 54. If the case is so urgent that Article 54 cannot be applied, it will nevertheless be necessary for the state not to take unilateral action until it has consulted the other states concerned and has attempted to reach agreement.

(3) The Commission is fully aware that the application of Article 55 may give rise to difficulties if a coastal state wishes to enact regulations in an area which is also adjacent to the coasts of other states. In that case the application of the measures will depend upon an agreement between the coastal states concerned.

(4) The stipulation that, if challenged, the measures adopted remain obligatory pending the arbitral decision has been criticized by certain governments. The Commission nevertheless considers that this provision is essential. If objections by another state to the unilateral regulations of the coastal state sufficed to suspend their application, the whole purpose of the article, which is to give the coastal state the right to take measures in case of urgent need, would be frustrated. The power given to the arbitral commission under Article 58, paragraph 2, to suspend application pending its award seems an adequate safeguard against abuse.

ARTICLE 56

1. Any state which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent to its coast, has a special interest in the conservation of the living resources in that area, may request the state whose nationals are engaged in fishing there to take the necessary measures of conservation.

2. If no agreement is reached within a reasonable period, such state may initiate the procedure contemplated by Article 57.

Commentary

(1) This article provides for the case of a state, other than the coastal state, whose nationals are not engaged in fishing in a given area but which has a special interest in the conservation of the living resources of the high seas in that area. This case may arise, for example, if the exhaustion of the resources of the sea in the area would affect the results of fishing in another area where the nationals of the state concerned do engage in fishing. The Commission took the view that in such an event the state concerned could request the state whose nationals engage in fishing in the areas exposed to exhaustion to take the necessary steps to safeguard the interests threatened. Where no agreement can be reached, the question will be settled in accordance with the procedure contemplated by Article 57.

(2) For the criteria to be applied by the arbitral commission, see Article 58 and the commentary thereto.

ARTICLE 57

1. Any disagreement arising between states under Articles 52, 53, 54, 55 and 56 shall, at the request of any of the parties, be submitted for settlement to an arbitral commission of seven members, unless the parties agree to seek a solution by another method of peaceful settlement.

2. Except as provided in paragraph 3, two members of the arbitral commission shall be named by the state or states on the one side of the dispute, and two members shall be named by the state or states contending to the contrary, but only one of the members nominated by each side may be a national of a state on that side. The remaining three members, one of whom shall be designated as chairman, shall be named by agreement between the states in dispute. Failing agreement they shall, upon the request of any state party, be nominated by the Secretary-General of the United Nations after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization, from nationals of countries not parties to the dispute. If, within a period of three months from the date of the request for arbitration, there shall be a failure by those on either side in the dispute to name any member, such member or members shall, upon the request of any party, be named, after such consultation, by the Secretary-General of the United Nations. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

3. If the parties to the dispute fall into more than two opposing groups, the arbitral commission shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations, after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization from amongst well qualified persons specializing in legal,

administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

4. Except as herein provided the arbitral commission shall determine its own procedure. It shall also determine how the costs and expenses shall be divided between the parties.

5. The arbitral commission shall in all cases be constituted within three months from the date of the original request and shall render its decision within a further period of five months unless it decides, in case of necessity, to extend that time limit.

Commentary

(1) This article describes the procedure for the settlement of disputes arising between states in the cases referred to in the preceding articles. The draft text leaves the parties entirely free as regards the method of settlement. They may submit their disputes to the International Court of Justice by agreement of [*sic*] or in accordance with mutual treaty obligations; they may set up courts of arbitration; they may, if they so desire, seek to compose their disagreements through a commission set up for the purpose, before resorting to these procedures. It is only where the parties fail to agree on the method of settling a dispute that the draft text provides for arbitration, while leaving the parties an entirely free choice as to arrangements for arbitration. If, however, the parties fail to agree on this subject within three months from the date of the original request, the draft provides for the setting up of a commission partly or wholly without their co-operation.

In this connexion, the article distinguishes between :

(i) The case of a dispute between two states or a dispute between several states divided into two opposing groups, each group being homogeneous as regards the interests to be safeguarded ;

(ii) The case of several parties to the dispute divided into more than two groups, each with different interests.

(2) The first will be the more frequent case. If, on either side, there are several states parties to the dispute, they may join together and act as one party in regard to the appointment of arbitrators. In this case there is no need to depart from the usual methods in forming the arbitral commission. Each state, or each group of states, will appoint two arbitrators, only one of whom may be a national of the state or of one of the states appointing him. Failing agreement between the parties, the other three members of the commission will be appointed by the Secretary-General of the United Nations after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization, from nationals of states not parties to the dispute. In the second case the above method cannot be applied, and recourse must be had to an impartial authority which will appoint the

whole arbitral commission. In this case too the most appropriate authority seems to be the Secretary-General of the United Nations, acting after consultation with the two authorities previously mentioned.

(3) In view of the diversity of the interests involved, the number of arbitrators will have to be fairly large. Hence the Commission provides for a commission of seven members. The appointment to be made by the Secretary-General must be from amongst properly qualified persons, experts in legal, administrative or scientific matters appertaining to fisheries, depending upon the nature of the dispute. To ensure the continuity of the arbitral commission's work in all circumstances, it was necessary to authorize the Secretary-General to fill any casual vacancies arising after the appointment of the arbitrators.

(4) It seemed fair to let the arbitral commission determine how the costs entailed by its proceedings should be divided between the parties.

(5) The fifth paragraph prescribes certain time limits for the purpose of preventing the arbitration procedure from being protracted. The arbitral commission will be entitled to extend the five-months' period allowed for rendering its award. But it must not exercise this right except in case of necessity. Having regard to the provision that the measures adopted remain in force pending the arbitral award, it might be prejudicial to the interests of one of the parties if the procedure dragged on too long. If necessary, the arbitral commission could apply Article 58 which authorizes it to suspend the application of the measures in dispute.

ARTICLE 58

1. The arbitral commission shall, in the case of measures unilaterally adopted by coastal states, apply the criteria listed in paragraph 2 of Article 55. In other cases it shall apply these criteria according to the circumstances of each case.

2. The arbitral commission may decide that pending its award the measures in dispute shall not be applied.

Commentary

(1) Paragraph 1 mentions the criteria on which the arbitral commission's decision should be based. In the case of Article 55, the criteria are of course those listed in that article. But these criteria do not wholly apply in the other cases. It seems desirable to give the arbitral commission some discretion in regard to the criteria to be applied in these cases. Subject to this remark, the Commission wishes to formulate the following guiding principles.

(i) Common to all the determinations are the requirements:

(a) That scientific findings shall demonstrate the necessity of conservation measures to make possible the optimum sustainable productivity of the stock or stocks of fish;

(b) That the measures do not discriminate against foreign fishermen.

(ii) Common to Articles 52, 53, 54 and 55 is the requirement:

That the specific measures shall be based on scientific findings and appropriate for the purpose. In determining appropriateness, the elements of effectiveness and practicability are to be considered as well as the relation between the expected benefits, in terms of maintained and increased productivity, and the cost of application and enforcement of the proposed measures.

(iii) In the case of Article 56, the state requesting the fishing state to take necessary measures of conservation would be a non-adjacent and non-fishing state. Such a state would be concerned only with the continued productivity of the resources. Therefore, the matter to be determined would be the adequacy of the over-all conservation programme.

(iv) Article 55 contains a criterion which is not included in the other articles: that of the urgency of action. Recourse to unilateral regulation by the coastal state prior to arbitration of the dispute can only be regarded as justified when the delay caused by arbitration would seriously threaten the continued productivity of the resources.

ARTICLE 59

The decisions of the arbitral commission shall be binding on the states concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration.

Commentary

(1) The arbitral commission's decisions are binding only upon the parties to the dispute; they have no effect *erga omnes*. Hence, a state whose nationals wish to engage in fishing in an area regarding which an arbitral decision binding other states *inter se* has already been rendered is entitled to use paragraph 2 of Article 53 to initiate fresh arbitral proceedings.

(2) The arbitral commission is required to give a ruling on the points in dispute; it is no part of its duty to issue new regulations, unless the parties have requested it to do so. The arbitral commission may append proposals for conservatory measures to its decisions, but they will not be binding.

* * *

Claims of exclusive fishing rights, on the basis of special economic circumstances

(1) The Commission's attention had been directed to a proposal that where a nation is primarily dependent on the coastal fisheries for its livelihood, the state concerned should have the right to exercise exclusive jurisdiction over fisheries up to a reasonable distance from the coast having regard to relevant local considerations, when this is necessary for the conservation of these fisheries as a means of subsistence for the population. It was proposed that in such cases the territorial sea might be extended or a special zone established for the above-mentioned purpose.

(2) After some discussion of this problem the Commission realized that

it was not in the position fully to examine its implications and the elements of exclusive use involved therein. The Commission recognized, however, that the proposal, as in the case of the principle of abstention (see commentary to Article 53), may reflect problems and interests which deserve recognition in international law. However, lacking competence in the fields of biological science and economics adequately to study these exceptional situations the Commission, while drawing attention to the problem, has refrained from making any concrete proposals.

* * *

*Fisheries conducted by means of equipment embedded
in the floor of the sea*

ARTICLE 60

The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a state, may be undertaken by that state where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals. Such regulations will not, however, affect the general status of the areas as high seas.

Commentary

(1) The present article, in a slightly modified form, figured amongst the articles on sedentary fisheries adopted by the Commission at its third session. When, at its fifth session, the Commission decided to recognize a right for coastal states to exploit the natural resources of the continental shelf, the article disappeared from the draft. However, at its eighth session, the Commission recognized that the article deserved to be maintained insofar as it dealt with fisheries conducted by means of equipment embedded in the bed of the sea. In fact, fisheries are described as sedentary either by reason of the species caught or by reason of the equipment used. The first case concerns products attached to the bed of the sea; in the second case the "sedentary" character of the fishery is determined by the fact that the fishing is conducted by means of equipment embedded in the bed of the sea. The Commission decided to keep the term "sedentary fisheries" for the first type of activity only. This form of fishery is regulated by Article 68 concerning the continental shelf. The second type of activity is regulated in the present article. This form of fishery is not covered by Article 68 concerning the continental shelf because the species fished are mobile and therefore cannot be regarded as natural resources of the seabed in the sense in which that term is used in the aforesaid article.

(2) Banks where there are fisheries conducted by means of equipment embedded in the bed of the sea have been regarded by some coastal states as under their occupation and as forming part of their territory. Without wishing to describe these areas as "occupied" or as constituting

"property" of the coastal state, the Commission considers that the special position of these areas justifies special rights being recognized as pertaining to coastal states whose nationals have been carrying on fishing there over a long period.

(3) The existing rule of customary law by which nationals of other states are at liberty to engage in such fishing on the same footing as the nationals of the coastal state should continue to apply. The exercise of other kinds of fishing in such areas must not be hindered except to the extent strictly necessary for the protection of the fisheries contemplated by the present article.

(4) The special rights which the coastal state may exercise in such areas must be strictly limited to such rights as are essential to achieve the ends for which they are recognized. The waters covering the seabed where the fishing grounds are located remain subject to the régime of the high seas.

SUBSECTION C. SUBMARINE CABLES AND PIPELINES

ARTICLE 61

1. All states shall be entitled to lay telegraph, telephone or high-voltage power cables and pipelines on the bed of the high seas.

2. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal state may not impede the laying or maintenance of such cables or pipelines.

Commentary

(1) As regards the protection of telegraph and telephone cables beneath the high seas, there is a Convention dated 14 March 1884 to which a very large number of maritime states are parties. In 1913, a conference convened in London on the initiative of the British Government adopted a number of resolutions on the subject. The Institute of International Law has also considered the question on many occasions.

(2) The Commission has enunciated in the present article certain principles which, in its view, reflect existing international law. It thought that the regulations concerning telegraph and telephone cables could be extended to include high-voltage cables and pipelines beneath the high seas.

(3) Paragraph 1 of Article 61 is taken from Article I of the 1884 Convention. Paragraph 2 was added to make it quite clear that the coastal state is obliged to permit the laying of cables and pipelines on the floor of its continental shelf, but that it can impose conditions as to the route to be followed, in order to prevent undue interference with the exploitation of the natural resources of the seabed and subsoil. Clearly, cables and pipelines must not be laid in such a way as to hamper navigation.

(4) For the laying of submarine cables and pipelines on the floor of a continental shelf, see Article 70 and the commentary thereto.

ARTICLE 62

Every state shall take the necessary legislative measures to provide that the breaking or injury of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine high-voltage power cable or pipeline, shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.

Commentary

This article is substantially the same as Article II of the 1884 Convention, but extends the latter to include pipelines and high-voltage power cables. Like the succeeding articles, it was so worded as to require states to take the necessary legislative measures to ensure that their nationals comply with the regulations. Obviously if the presence of the cable or pipeline has not been adequately marked, there can be no question of "culpable negligence" on the part of navigators (*cf.* Article V of the Convention).

ARTICLE 63

Every state shall take the necessary legislative measures to provide that, if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost.

Commentary

(*cf.* Article IV of the 1884 Convention).

ARTICLE 64

Every state shall regulate trawling so as to ensure that all the fishing gear used shall be so constructed and maintained as to reduce to the minimum any danger of fouling submarine cables or pipelines.

Commentary

(*cf.* Resolution I of the London Conference of 1913).

ARTICLE 65

Every state shall take the necessary legislative measures to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injuring a submarine cable or pipeline shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.

Commentary

(1) *Cf.* Article VII of the 1884 Convention.

(2) The last phrase has been added in order to make it quite clear that compensation cannot be claimed if there has been any negligence on the part of the ship.

SECTION II. CONTIGUOUS ZONE

As part of its work on the régime of the high seas, the Commission adopted at its third session, an article on the contiguous zone.²¹ Apart from some qualifications and reservations, the principle underlying that article has encountered no opposition on the part of governments which have commented on the subject. The article, as adopted after the discussions at the fifth and eighth sessions, differs only slightly from the 1951 draft. The wording has been modified, however, in order to express the Commission's idea more clearly. The article is as follows:

ARTICLE 66

1. In a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to

(a) Prevent infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

Commentary

(1) International law accords states the right to exercise preventive or protective control for certain purposes over a belt of the high seas contiguous to their territorial sea. It is, of course, understood that this power of control does not change the legal status of the waters over which it is exercised. These waters are and remain a part of the high seas and are not subject to the sovereignty of the coastal state, which can exercise over them only such rights as are conferred on it by the present draft or are derived from international treaties.

(2) Many states have adopted the principle that in the contiguous zone the coastal state may exercise customs control in order to prevent attempted infringements of its customs and fiscal regulations within its territory or territorial sea, and to punish infringements of those regulations committed within its territory or territorial sea. The Commission considered that it would be impossible to deny to states the exercise of such rights.

(3) Although the number of states which claim rights over the contiguous zone for the purpose of applying sanitary regulations is fairly small, the Commission considers that, in view of the connexion between customs and sanitary regulations, such rights should also be recognized for sanitary regulations.

²¹ Official Records of the General Assembly, 6th Sess., Supp. No. 9 (A/1858), p. 20.

(4) The Commission did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term "security" would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the state. Insofar as measures of self-defence against an imminent and direct threat to the security of the state are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations.

(5) Nor was the Commission willing to recognize any exclusive right of the coastal state to engage in fishing in the contiguous zone. The Preparatory Committee of the Hague Codification Conference found, in 1930, that the replies from governments offered no prospect of an agreement to extend the exclusive fishing rights of the coastal state beyond the territorial sea. The Commission considered that in that respect the position has not changed.

(6) The Commission examined the question whether the same attitude should be adopted with regard to proposals to grant the coastal state the right to take whatever measures it considered necessary for the conservation of the living resources of the sea in the contiguous zone. The majority of the Commission were unwilling to accept such a claim. They argued, first, that measures of this kind applying only to the relatively small area of the contiguous zone would be of little practical value and, secondly, that having provided for the regulation of the conservation of living resources in a special part of the present draft, it would be inadvisable to open the way for a duplication of these rules by different provisions designed to regulate the same matters in the contiguous zone only. Since the contiguous zone is a part of the high seas, the rules concerning conservation of the living resources of the sea apply to it.

(7) The Commission did not maintain its previous decision to grant the coastal state, within the contiguous zone, a right of control in respect of immigration. In its report on the work of its fifth session the Commission commented on this provision as follows:

"It is understood that the term 'customs regulations' as used in the article refers not only to regulations concerning import and export duties but also to other regulations concerning the exportation and importation of goods. In addition, the Commission thought it necessary to amplify the formulation previously adopted by referring expressly to immigration, a term which is also intended to include emigration."²²

Reconsidering this decision, the majority of the Commission took the view that the interests of the coastal state do not require an extension of the right of control to immigration and emigration. It considered that such control could and should be exercised in the territory of the coastal state and that there was no need to grant it special rights for this purpose in the contiguous zone.

²² Official Records of the General Assembly, 8th Sess., Supp. No. 9 (A/2456), par. 111.

(8) The Commission considered the case of areas of the sea situated off the junction of two or more adjacent states, where the exercise of rights in the contiguous zone by one state would not leave any free access to the ports of another state except through that zone. The Commission, recognizing that in such cases the exercise of rights in the contiguous zone by one state may unjustifiably obstruct traffic to or from a port of another state, considered that in the case referred to it would be necessary for the two states to conclude a prior agreement on the exercise of rights in the contiguous zone. In view of the exceptional nature of the case, however, the Commission did not consider it necessary to include a formal rule to this effect.

(9) The Commission considers that the breadth of the contiguous zone cannot exceed twelve miles from the coast, the figure adopted by the Preparatory Committee of the Hague Codification Conference (1930). Until such time as there is unanimity in regard to the breadth of the territorial sea, the zone should be measured from the coast and not from the outer limit of the territorial sea. States which have claimed extensive territorial waters have in fact less need for a contiguous zone than those which have been more modest in their delimitation.

(10) The Commission thought it advisable to clarify the expression "from the coast" by stating that the zone is measured from the baseline from which the breadth of the territorial sea is measured.

(11) The exercise by the coastal state of the rights enunciated in this article does not affect the legal status of the airspace above the contiguous zone. The question whether the establishment of such an air control zone could be contemplated is outside the scope of these rules of the law of the sea.

SECTION III. THE CONTINENTAL SHELF

(1) At its third session, held in 1951, the Commission adopted draft articles on the continental shelf with accompanying comments. After the third session, the special rapporteur re-examined these articles in the light of comments received from the governments of eighteen countries. The comments of these governments are reproduced in Annex II to the Report on the Fifth Session.²³ In March, 1953, the special rapporteur submitted a further report on the subject (A/CN.4/60) which was examined by the Commission at its fifth session. The Commission adopted draft articles, which it re-examined at its eighth session, in the context of the other sections of the rules of the law of the sea. This examination did not give rise to any major changes, except with regard to the delimitation of the continental shelf (see Article 67).

(2) The Commission accepted the idea that the coastal state may exercise control and jurisdiction over the continental shelf, with the proviso that such control and jurisdiction shall be exercised solely for the purpose of exploiting its resources; and it rejected any claim to sovereignty or jurisdiction over the superjacent waters.

²³ Official Records of the General Assembly, 8th Sess., Supp. No. 9 (A/2456).

(3) In some circles it is thought that the exploitation of the natural resources of submarine areas should be entrusted, not to coastal states, but to agencies of the international community generally. In present circumstances, however, such internationalization would meet with insurmountable practical difficulties, and would not ensure the effective exploitation of natural resources necessary to meet the needs of mankind.

(4) The Commission is aware that exploration and exploitation of the seabed and subsoil, which involves the exercise of control and jurisdiction by the coastal state, may affect the freedom of the seas, particularly in respect of navigation. Nevertheless, this cannot be a sufficient reason for obstructing a development which, in the opinion of the Commission, can be to the benefit of all mankind. The necessary steps must be taken to ensure that this development affects the freedom of the seas no more than is absolutely unavoidable, since that freedom is of paramount importance to the international community. The Commission thought it possible to combine the needs of the exploitation of the seabed and subsoil with the requirement that the sea itself must remain open to all nations for navigation and fishing. With these considerations in mind, the Commission drafted the following articles.

ARTICLE 67

For the purposes of these articles, the term "continental shelf" is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres (approximately 100 fathoms), or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

Commentary

(1) In its first draft, prepared in 1951, the Commission designated the continental shelf as "the seabed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil."²⁴ It followed from this definition that areas in which exploitation was not technically possible by reason of the depth of the water, were excluded from the continental shelf.

(2) The Commission had considered the possibility of adopting a fixed limit for the continental shelf in terms of the depth of the superjacent waters. It seemed likely that a limit fixed at a point where the sea covering the continental shelf reaches a depth of 200 metres would at present be sufficient for all practical needs. This depth also coincides with that at which the continental shelf in the geological sense generally comes to an end and the continental slope begins, falling steeply to a great depth. The Commission felt, however, that such a limit would have the disadvantage of instability. Technical developments in the near future might

²⁴ Official Records of the General Assembly, 6th Sess., Supp. No. 9 (A/1858), p. 17.

make it possible to exploit the resources of the seabed at a depth of over 200 metres. Moreover, the continental shelf might well include submarine areas lying at a depth of over 200 metres, but susceptible of exploitation by means of installations erected in neighbouring areas where the depth does not exceed this limit. Hence the Commission decided not to specify a depth limit of 200 metres.

(3) At its fifth session, in 1953, the Commission reconsidered this decision. It abandoned the criterion of exploitability in favour of that of a depth of 200 metres. In the light of the comments submitted by certain governments, the Commission came to the conclusion that the text previously adopted lacked the necessary precision and might give rise to disputes and uncertainty. The Commission considered that the limit of 200 metres would be sufficient for all practical purposes at present and probably for a long time to come. It took the view that the adoption of a fixed limit would have considerable advantages, in particular with regard to the delimitation of continental shelves between adjacent states or states opposite each other. The adoption of different limits by different states might cause difficulties of the same kind as differences in the breadth of the territorial sea. The Commission was aware that future technical progress might make exploitation possible at a depth greater than 200 metres; in that case the limit would have to be revised, but meanwhile there was every advantage in having a stable limit.

(4) At its eighth session, the Commission reconsidered this provision. It noted that the Inter-American Specialized Conference on "Conservation of Natural Resources: Continental Shelf and Oceanic Waters," held at Ciudad Trujillo (Dominican Republic) in March 1956, had arrived at the conclusion that the right of the coastal state should be extended beyond the limit of 200 metres, "to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil." Certain members thought that the article adopted in 1953 should be modified. While agreeing that in present circumstances the limit adopted is in keeping with practical needs, they disapproved of a provision prohibiting exploitation of the continental shelf at a depth greater than 200 metres even if such exploitation was a practical possibility. They thought that in the latter case, the right to exploit should not be made subject to prior alteration of the limit adopted. While maintaining the limit of 200 metres in this article as the normal limit corresponding to present needs, they wished to recognize forthwith the right to exceed that limit if exploitation of the seabed or subsoil at a depth greater than 200 metres proved technically possible. It was therefore proposed that the following words should be added to the article, "or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." In the opinion of certain members this addition would also have the advantage of not encouraging the belief that up to 200 metres depth there is a fixed zone where rights of sovereignty other than those stated in Article 68 below can be exercised. Other members contested the usefulness of the addition, which in their

opinion unjustifiably and dangerously impaired the stability of the limit adopted. The majority of the Commission nevertheless decided in favour of the addition.

(5) The sense in which the term "continental shelf" is used departs to some extent from the geological concept of the term. The varied use of the term by scientists is in itself an obstacle to the adoption of the geological concept as a basis for legal regulation of this problem.

(6) There was yet another reason why the Commission decided not to adhere strictly to the geological concept of the continental shelf. The mere fact that the existence of a continental shelf in the geological sense might be questioned in regard to submarine areas where the depth of the sea would nevertheless permit of exploitation of the subsoil in the same way as if there were a continental shelf, could not justify the application of a discriminatory legal régime to these regions.

(7) While adopting, to a certain extent, the geographical test for the "continental shelf" as the basis of the juridical definition of the term, the Commission therefore in no way holds that the existence of a continental shelf, in the geographical sense as generally understood, is essential for the exercise of the rights of the coastal state as defined in these articles. Thus, if, as is the case in the Persian Gulf, the submarine areas never reach the depth of 200 metres, that fact is irrelevant for the purposes of the present article. Again, exploitation of a submarine area at a depth exceeding 200 metres is not contrary to the present rules, merely because the area is not a continental shelf in the geological sense.

(8) In the special cases in which submerged areas of a depth less than 200 metres, situated fairly close to the coast, are separated from the part of the continental shelf adjacent to the coast by a narrow channel deeper than 200 metres, such shallow areas could be considered as adjacent to that part of the shelf. It would be for the state relying on this exception to the general rule to establish its claim to an equitable modification of the rule. In case of dispute it must be a matter for arbitral determination whether a shallow submarine area falls within the rule as here formulated.

(9) Noting that it was departing from the strictly geological concept of the term, *inter alia*, in view of the inclusion of exploitable areas beyond the depth of 200 metres, the Commission considered the possibility of adopting a term other than "continental shelf." It considered whether it would not be better, in conformity with the usage employed in certain scientific works and also in some national laws and international instruments, to call these regions "submarine areas." The majority of the Commission decided to retain the term "continental shelf" because it is in current use and because the term "submarine areas" used without further explanation would not give a sufficient indication of the nature of the areas in question. The Commission considered that some departure from the geological meaning of the term "continental shelf" was justified, provided that the meaning of the term for the purpose of these articles was clearly defined. It has stated this meaning of the term in the present article.

(10) The term "continental shelf" does not imply that it refers ex-

clusively to continents in the current connotation of that word. It also covers the submarine areas contiguous to islands.

(11) Lastly the Commission points out that it does not intend limiting the exploitation of the subsoil of the high seas by means of tunnels, cuttings or wells dug from *terra firma*. Such exploitation of the subsoil of the high seas by a coastal state is not subject to any legal limitation by reference to the depth of the superjacent waters.

ARTICLE 68 *

The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

Commentary

(1) While this article, as provisionally formulated in 1951 (Article 2 of the draft), referred to the continental shelf as "subject to the exercise by the coastal state of control and jurisdiction for the purpose of exploring it and exploiting its natural resources," the article as now formulated lays down that "the coastal state exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources."

(2) The Commission desired to avoid language lending itself to interpretations alien to an object which the Commission considers to be of decisive importance, namely, the safeguarding of the principle of the full freedom of the superjacent sea and the airspace above it. Hence it was unwilling to accept the sovereignty of the coastal state over the seabed and subsoil of the continental shelf. On the other hand, the text as now adopted leaves no doubt that the rights conferred upon the coastal state cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf. Such rights include jurisdiction in connexion with the prevention and punishment of violations of the law. The rights of the coastal state are exclusive in the sense that, if it does not exploit the continental shelf, it is only with its consent that anyone else may do so.

(3) At its fifth session, the Commission decided after long discussion to retain the term "natural resources," as distinct from the more limited term "mineral resources." In its previous draft the Commission had only dealt with "mineral resources" and some members proposed adhering to that course. The Commission, however, came to the conclusion that the products of "sedentary" fisheries, in particular, to the extent that they were natural resources permanently attached to the bed of the sea should not be left outside the scope of the régime adopted, and that this aim could be achieved by using the term "natural resources." It is clearly understood that the rights in question do not cover so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there.

(4) At the eighth session it was proposed that the condition of permanent attachment to the seabed should be mentioned in the article itself. At the same time the opinion was expressed that the condition should be

made less strict; it would be sufficient that the marine fauna and flora in question should live in constant physical and biological relationship with the seabed and the continental shelf; examination of the scientific aspects of that question should be left to the experts. The Commission however decided to leave the text of the article and of the commentary as it stood.

(5) It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil.

(6) In the view of the Commission, the coastal state, when exercising its exclusive rights, must also respect the existing rights of nationals of other states. Any interference with such rights, when unavoidably necessitated by the requirements of exploration and exploitation of natural resources, is subject to the rules of international law concerning respect for the rights of aliens. However, apart from the case of acquired rights, the sovereign rights of the coastal state over its continental shelf also cover "sedentary" fisheries in the sense indicated above. As regards fisheries which are also sometimes described as "sedentary" because they are conducted by means of equipment fixed in the sea, but which are not concerned with natural resources attached to the seabed, the Commission refers to Article 60 of these rules.

(7) The rights of the coastal state over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

(8) The Commission does not deem it necessary to expatiate on the question of the nature and legal basis of the sovereign rights attributed to the coastal state. The considerations relevant to this matter cannot be reduced to a single factor. In particular, it is not possible to base the sovereign rights of the coastal state exclusively on recent practice, for there is no question in the present case of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the states concerned. However, that practice itself is considered by the Commission to be supported by considerations of law and of fact. In particular, once the seabed and the subsoil have become an object of active interest to coastal states with a view to the exploration and exploitation of their resources, they cannot be considered as *res nullius*, i.e., capable of being appropriated by the first occupier. It is natural that coastal states should resist any such solution. Moreover, in most cases the effective exploitation of natural resources must presuppose the existence of installations on the territory of the coastal state. Neither is it possible to disregard the geographical phenomenon whatever the term—propinquity, contiguity, geographical continuity, appurtenance or identity—used to define the relationship between the submarine areas in question and the adjacent non-submerged land. All these considerations of general utility provide a sufficient basis for the principle of the sovereign rights of the coastal state as now formulated by the Commission. As already stated, that principle, which is based on general principles corresponding to the present needs of the international community, is in no way incompatible with the principle of the freedom of the seas.

(9) Although for the reasons stated, as well as for practical considerations, the Commission was unable to endorse the idea of internationalization of the submarine areas comprised in the concept of the continental shelf, it did not discard the possibility of setting up an international body for scientific research and assistance with a view to promoting their most efficient use in the general interest. It is possible that some such body may one day be set up within the framework of an existing international organization.

(10) The proposals made by the Commission in its Report for 1953 caused some anxiety in scientific circles, where it was thought that freedom to conduct scientific research in the soil of the continental shelf and in the waters above would be endangered. Insofar as such researches are conducted in the waters above a continental shelf, this anxiety seems to be unjustified since the freedom to conduct research in these waters—which still form part of the high seas—is in no way affected. The coastal state will not have the right to prohibit scientific research, in particular research on the conservation of the living resources of the sea. The consent of the state will only be required for research relating to the exploration or exploitation of the seabed or subsoil. It is to be expected that the coastal state will only refuse its consent exceptionally, and in cases in which it fears an impediment to its exclusive rights to explore and exploit the seabed and subsoil.

ARTICLE 69

The rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

Commentary

Article 69 is intended to ensure respect for the freedom of the seas in face of the sovereign rights of the coastal state over the continental shelf. It provides that the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas or of the airspace above the superjacent waters. A claim to sovereign rights in the continental shelf can only extend to the seabed and subsoil and not to the superjacent waters; such a claim cannot confer any jurisdiction or exclusive right over the superjacent waters, which are and remain a part of the high seas. The articles on the continental shelf are intended as laying down the régime of the continental shelf, only as subject to and within the orbit of the paramount principle of the freedom of the seas and of the airspace above them. No modification of or exceptions to that principle are admissible unless expressly provided for in the various articles.

ARTICLE 70

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal state may not impede the laying or maintenance of submarine cables on the continental shelf.

Commentary

(1) The coastal state is required to permit the laying of submarine cables on the seabed of its continental shelf, but in order to avoid unjustified interference with the exploitation of the natural resources of the seabed and subsoil, it may impose conditions concerning the route to be followed.

(2) The Commission considered whether this provision should not be extended to pipelines. In principle, the answer must be in the affirmative. The question is, however, complicated by the fact that it would often be necessary to install pumping stations at certain points, which might hinder the exploitation of the soil more than cables. It follows that the coastal state might be less liberal in this matter than in the case of cables. As the question does not yet seem to be of practical importance, the Commission has not expressly referred to pipelines in the present article.

ARTICLE 71

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea.

2. Subject to the provisions of paragraphs 1 and 5 of this article, the coastal state is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resources, and to establish safety zones at a reasonable distance around such installations and take in those zones measures necessary for their protection.

3. Such installations, though under the jurisdiction of the coastal state, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal state.

4. Due notice must be given of any such installations constructed, and permanent means for giving warning of their presence must be maintained.

5. Neither the installations themselves, nor the said safety zones around them may be established in narrow channels or where interference may be caused in recognized sea lanes essential to international navigation.

Commentary

(1) While Article 69 lays down in general terms the basic principle of the unaltered legal status of the superjacent sea and the air above it, Article 71 applies that basic principle to the main manifestations of the freedom of the seas, namely, freedom of navigation and of fishing. Paragraph 1 of this article lays down that the exploration of the continental shelf must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea. It will be noted, however, that what the article prohibits is not any kind of interference, but only unjustifiable interference. The manner and the sig-

nificance of that qualification were the subject of prolonged discussion in the Commission. The progressive development of international law, which takes place against the background of established rules, must often result in the modification of those rules by reference to new interests or needs. The extent of that modification must be determined by the relative importance of the needs and interests involved. To lay down, therefore, that the exploration and exploitation of the continental shelf must never result in any interference whatsoever with navigation and fishing might result in many cases in rendering somewhat nominal both the sovereign rights of exploration and exploitation and the very purpose of the articles as adopted. The case is clearly one of assessment of the relative importance of the interests involved. Interference, even if substantial, with navigation and fishing might, in some cases, be justified. On the other hand, interference even on an insignificant scale would be unjustified if unrelated to reasonably conceived requirements of exploration and exploitation of the continental shelf. While, in the first instance, the coastal state must be the judge of the reasonableness—or the justification—of the measures adopted, in case of dispute the matter must be settled on the basis of Article 73, which governs the settlement of all disputes regarding the interpretation or application of the articles.

(2) With regard to the conservation of the living resources of the sea, everything possible should be done to prevent damage by exploitation of the subsoil, seismic exploration in connexion with oil prospecting, and leaks from pipelines.

(3) Paragraphs 2 to 5 relate to the installations necessary for the exploration and exploitation of the continental shelf, as well as to safety zones around such installations and the measures necessary to protect them. These provisions, too, are subject to the overriding prohibition of unjustified interference. Although the Commission did not consider it essential to specify the size of the safety zones, it believes that generally speaking a maximum radius of 500 metres is sufficient for the purpose.

(4) Interested parties, *i.e.*, not only governments but also groups interested in navigation and fishing, should be duly notified of the construction of installations, so that these may be marked on charts. In any case, the installations should be equipped with warning devices (lights, audible signals, radar, buoys, etc.).

(5) There is, in principle, no duty to disclose in advance plans relating to contemplated construction of installations. However, in cases where the actual construction of provisional installations is likely to interfere with navigation, due means of warning must be maintained, in the same way as in the case of installations already completed, and as far as possible due notice must be given. If installations are abandoned or disused they must be entirely removed.

(6) With regard to the general status of installations, it has been thought useful to lay down expressly in paragraph 3 of this article, that they do not possess the status of islands and that the coastal state is not entitled to claim for installations any territorial waters of their own or

treat them as relevant for the delimitation of territorial waters. In particular, they cannot be taken into consideration for the purpose of determining the baseline. On the other hand, the installations are under the jurisdiction of the coastal state for the purpose of maintaining order and of the civil and criminal competence of its courts.

(7) While, generally, the Commission, by formulating the test of unjustifiable interference, thought it advisable to eliminate any semblance of rigidity in adapting the existing principle of the freedom of the sea to what is essentially a novel situation, it thought it desirable to rule out expressly any right of interference with navigation in certain areas of the sea. These areas are defined in paragraph 5 of this article as narrow channels or recognized sea lanes essential to international navigation. They are understood to include straits in the ordinary sense of the word. The importance of these areas for the purpose of international navigation is such as to preclude, in conformity with the tests of equivalence and relative importance of the interests involved, the construction of installations or the maintenance of safety zones therein, even if such installations or zones are necessary for the exploration or exploitation of the continental shelf.

ARTICLE 72

1. Where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such states shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the baselines from which the breadth of the territorial sea of each country is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the baselines from which the breadth of the territorial sea of each of the two countries is measured.

Commentary

(1) For the determination of the limits of the continental shelf the Commission adopted the same principles as for the Articles 12 and 14 concerning the delimitation of the territorial sea. As in the case of the boundaries of the territorial sea, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels. This case may arise fairly often, so that the rule adopted is fairly elastic.

(2) There would be certain advantages in having the boundary lines marked on official large-scale charts. But as it is less important to users of such charts to have this information than to know the boundary of the

territorial sea, the Commission refrained from imposing any obligation in the matter.

ARTICLE 73

Any disputes that may arise between states concerning the interpretation or application of Articles 67-72 shall be submitted to the International Court of Justice at the request of any of the parties, unless they agree on another method of peaceful settlement.

Commentary

(1) The text of the draft as adopted at the fifth session contained a general arbitration clause providing that any disputes which might arise between states concerning the interpretation or application of the articles should be submitted to arbitration at the request of any of the parties.

(2) At its eighth session the Commission amended this article to provide that disputes should be settled by the parties by a method agreed between them. Failing such agreement, each of the parties would have the right to submit the dispute to the International Court of Justice.

(3) The majority of the Commission considered that a clause providing for compulsory arbitration would not be of much practical value unless the Commission at the same time laid down the procedure to be followed, as in the case of disputes relating to conservation of the living resources of the sea. It was pointed out, however, that in the present context the disputes would not be of an extremely technical character as in the case of the conservation of the living resources of the sea. It was therefore considered that arbitration could be replaced by reference to the International Court of Justice.

(4) The Commission did not agree with certain members who were opposed to the insertion in the draft of a clause on compulsory arbitration or jurisdiction, on the ground that there was no reason to impose on states one only of the various means provided by existing international law, and particularly by Article 33 of the United Nations Charter, for the pacific settlement of international disputes. These members also pointed out that the insertion of such a clause would make the draft unacceptable to a great many states. The majority of the Commission nevertheless considered such a clause to be necessary. The articles on the continental shelf are the result of an attempt to reconcile the recognized principles of international law applicable to the régime of the high seas, with recognition of the rights of the coastal state over the continental shelf. Relying, as it must, on the continual necessity to assess the importance of the interests at stake on either side, this compromise solution must allow for some power of discretion. Thus, it will often be necessary to rely on a subjective assessment—with the resultant possibilities of disagreement—to determine whether, in the terms of Article 71, paragraph 1, the measures taken by the coastal state to explore and exploit the continental shelf result in “unjustifiable” interference with navigation or fishing; whether, as is laid down in paragraph 2 of that article, the safety zones established by the

for a state do not exceed a "reasonable" distance around the installation. In the terms of paragraph 5 of the article, a sea line is "essential" and whether it is "essential to international navigation"; for the coastal state, when preventing the laying of submarine cables or pipelines, is really acting in the spirit of Article 70, which only authorizes such action when it comes within the scope of "reasonable measures for the exploration and exploitation of the continental shelf. If it is not kept within the limits of respect for law and is not impartially controlled with, the new régime of the continental shelf may endanger the higher principle of the freedom of the seas. Consequently, it seems essential that states which disagree concerning the exploration and exploitation of the continental shelf should be required to submit any dispute arising on this subject to an impartial authority. For this reason the majority of the Commission thought it necessary to include the clause in question. It is incumbent on the parties to decide the manner in which they wish to settle their differences; if the parties are unable to reach agreement on the manner of settlement, however, either party may refer the matter to the International Court of Justice.

CHAPTER III

PROGRESS OF WORK ON OTHER SUBJECTS UNDER STUDY BY THE COMMISSION

I. LAW OF TREATIES

34. The special rapporteur for the law of treaties, Sir Gerald Fitzmaurice, submitted a report (A/CN.4/101) at the eighth session. Because of lack of time, the Commission was unable to enter upon a full discussion of the report; at its 368th to 370th meetings, however, it considered certain general questions placed before it by the special rapporteur regarding the form and scope of the codification envisaged in this field. The special rapporteur was requested to continue his work in the light of the debate.

II. STATE RESPONSIBILITY

35. At its 370th to 373rd meetings the Commission considered the basis of discussion submitted by the special rapporteur, Mr. F. V. García Amador, in Chapter X of his report entitled "International Responsibility" (A/CN.4/96). Without taking any decisions on the particular points, the Commission requested the special rapporteur to continue his work in the light of the views expressed by the members.

III. CONSULAR INTERCOURSE AND IMMUNITIES

36. At its 373rd and 374th meetings the Commission considered a number of questions submitted in a paper by the special rapporteur, Mr. A. Zourek, with a view to obtaining the opinion of the members thereon for his guidance in the preparation of his report for the next session. The special rapporteur was requested to continue his work in the light of the debate.

CHAPTER IV

OTHER DECISIONS OF THE COMMISSION

I. QUESTION OF AMENDING ARTICLE 11 OF THE STATUTE
OF THE COMMISSION

37. By its resolution 986 (X) dated 3 December 1955 the General Assembly invited the Commission to communicate its opinion concerning the question whether Article 11 of its Statute relating to the filling of casual vacancies in its membership should be modified in view of the fact that the term of office of the members had been increased from three to five years.

38. Careful consideration was given by the Commission to a proposal to recommend to the General Assembly that Article 11 should be amended to provide that casual vacancies should be filled by the General Assembly instead of by the Commission itself as has been the case under the present wording of the article. The Commission decided not to adopt that proposal, for the reason, *inter alia*, that, as the General Assembly meets shortly after the session of the Commission, the filling of such vacancies by the General Assembly would be delayed with the result that the Commission would have to work for at least one session with the vacancy unfilled.

II. PUBLICATION OF THE DOCUMENTS OF THE COMMISSION

39. By its resolution 987 (X) dated 3 December 1955, the General Assembly gave instructions to the Secretary-General concerning the printing of the Commission's documents and invited the Commission to express its views for the guidance of the Secretary-General regarding the selection and editing of the documents to be printed and also invited it, if necessary, to re-submit the question of the printing of the documents to the General Assembly.

40. The matter was considered on the basis of a note prepared by the Secretariat (A/CN.4/L.67).

41. The Commission does not deem it necessary to re-submit the question of the printing of the documents to the Assembly.

42. The Commission recommends that the records and documents be published in the form of a year book, consisting of one or two volumes according to the size of the documentation of each session. With respect to presentation, it is proposed that the year book shall consist of three parts; namely:

(a) Reports of special rapporteurs, communications from governments and memoranda and studies by the Secretariat (*i.e.*, essentially documents issued in preparation of each session);

(b) Summary records, including working documents issued during the session;

(c) The report on the work of the session.

The Commission considers it indispensable that the report on each session be included in the year book, and also that the latter be provided with an index.

43. The documents to be included shall be decided at the end of each

son by the Chairman, acting under the authority of the Commission, in consultation with the Secretary.

1. The Commission suggests that the publication should be entitled "Year Book of the International Law Commission."

2. Regarding the publication of the documents of previous sessions, the Commission would recommend that priority should be given to the sessions at which the law of the sea was discussed.

III. CO-OPERATION WITH INTER-AMERICAN BODIES

10. The Commission heard a statement of its Secretary introducing the report (A/CN.4/102) submitted by him to the Commission on the third meeting of the Inter-American Council of Jurists held in Mexico City, from 17 January to 4 February 1956, which he attended in the capacity of an observer for the Commission. It also heard a statement by Mr. J. Cayes, representative of the Secretary-General of the Organization of American States.

11. On the proposal of the Chairman, the Commission thereafter adopted the following resolution:

"The International Law Commission,

"Recalling the resolutions adopted at its sixth and seventh sessions regarding co-operation with Inter-American bodies,

"Considering that the contacts established between the Commission and the Inter-American Council of Jurists through the participation of their respective secretaries in the sessions of these bodies should be continued,

"1. Expresses its appreciation to the Secretary-General of the United Nations for sending the Secretary of the Commission to attend the third meeting of the Inter-American Council of Jurists;

"2. Takes note of the report of the Secretary on that meeting

"3. Expresses its thanks to the Secretary-General of the Organization of American States for sending the Assistant Director of the Department of International Law of the Pan American Union to attend the eighth session of the Commission;

"4. Requests the Secretary-General of the United Nations to authorize the Secretary of the Commission to attend, in the capacity of an observer for the Commission, the fourth meeting of the Inter-American Council of Jurists to be held in Santiago, Chile, in 1958, and to report to the Commission at its following session."

IV. PRESENCE OF THE RAPPORTEUR AT THE ELEVENTH SESSION OF THE GENERAL ASSEMBLY

48. On the proposal of the Chairman, the Commission decided that Mr. Francis, the Rapporteur for the current session, who had been the special rapporteur on the régime of the high seas and the régime of the territorial sea since the beginning of the work of the Commission on those subjects, should attend the eleventh session of the General Assembly and furnish such information on the Commission's draft on the law of the sea as might be required in connexion with the consideration of the matter by the Assembly.

V. DATE AND PLACE OF NEXT SESSION

49. In accordance with the provisions of Article 12 of its Statute as amended by General Assembly resolution 984 (X) of 3 December 1955, the Commission decided to hold its next session at Geneva, Switzerland, for a period of ten weeks beginning on 23 April 1957.

50. In view of the fact that most of the current session had to be devoted to the study of the law of the sea, in order to complete the Commission's work on that subject in pursuance of General Assembly resolution 899 (IX) of 14 December 1954, the Commission considers that a ten weeks' session is the minimum required to enable it to make substantial progress in the other five major items on its agenda.

51. The aforementioned date for the beginning of its next session was fixed by the Commission in order to avoid overlapping with the summer session of the Economic and Social Council, as requested by General Assembly resolution 694 (VII) of 20 December 1952. For many reasons, the Commission, however, would prefer a later opening date for its sessions in the future and expresses the hope that its wishes in that respect will be taken into account when the programme of conferences at Headquarters and Geneva is to be reviewed.

for the period for which it was first established. The 1888 Convention assumed that the operation of the Suez Canal Company would continue at least for the full period provided for by the company's concession, especially in view of the fact that Article 14 of the 1888 Convention expressly provides that the force of the treaty shall not be limited "by the duration of the Acts of Concession of the Universal Suez Canal Company."²²

On the other hand, the representative of Egypt contended that the mere fact that the 1888 Convention made mention of the concession agreement did not deprive them of their essentially private law character and did not confer upon them the status of a treaty.²³ Furthermore, he said, any alienation or limitation of Egypt's sovereign rights respecting the Suez Canal would require an express stipulation in the 1888 Convention.²⁴

The representative of the United Kingdom was invoking the private law doctrine of incorporation by reference in instruments.²⁵ Its application would have been stronger if the 1888 Convention had contained a statement that the concession agreement (Firman of February 22, 1866) formed an integral part of the treaty.²⁶ The general principle of international law invoked by the Egyptian representative, namely, that acts in derogation of sovereignty must be expressly stipulated and may not be inferred, was applied in the case of *Radio Corporation of America v. China*,²⁷ an arbitration involving the Chinese Government and an American corporation.

Semantically, the word "complete" as used in the preamble, is susceptible of at least the following interpretations: (1) that the pre-existing concessions system confirmed by the Firman has been completely absorbed in the international system established by the 1888 Convention so as to become an integral part of the latter treaty; (2) that the 1888 Convention is merely additive, in that the pre-existing concessions system and the international system together form a whole, with the two parts separable; and (3) even though the pre-existing concessions system is mentioned in the preamble, which concededly forms an integral part of the convention, nevertheless, not being in the *dispositif*, no legal significance can flow therefrom.

The Legislative History of the Preamble of the 1888 Convention

In view of the opposing interpretations advanced by the representatives of the United Kingdom and Egypt, it is permissible to resort to *travaux préparatoires* to discover the intent of the framers of the convention.²⁸ When this is done the result is rather illuminating.

²² U.N. Doc. S/P.V. 735, p. 3 at p. 6. Art. 14 of the 1888 Convention provides: "The engagements resulting from the present treaty shall not be limited by the duration of the Acts of Concession of the Universal Suez Canal Company." The *travaux préparatoires* do not appear to support the view contended for. See *infra*, p. 192.

²³ See U.N. Doc. S/P.V. 736, p. 1 at p. 7.

²⁴ 3 Reports of International Arbitration Awards (hereafter cited as Int. Arb. Awards) 1621 ff.

²⁵ See Kelsen, *The Law of the United Nations* xiii-xvii (Preface on International Law) (London, 1951).

The preamble of the 1888 Convention²⁶ emanated from the draft convention formulated in 1885 by the International Commission²⁷ which had been convened to draw up an international convention to guarantee free navigation of the Canal, based upon eight points contained in the Circular which the British Government in 1883 had sent to the principal European Powers.²⁸ This Circular made no mention of the concession agreements or the Firman.

The French draft preamble which formed the basis of discussion at the meetings of the Subcommission which considered the question read as follows:

[The President of the French Republic and the Contracting Parties] being desirous of confirming by a conventional act the system under which the navigation of the Suez Canal has been placed since its origin by concessions of His Highness the Khedive and the Firmans of His Imperial Majesty the Sultan. . . .²⁹

The Turkish delegate expressed the view that the words "the concessions accorded by the Firman of His Imperial Majesty granted at the request of His Highness the Khedive," were more in accordance with fact.³⁰ The British delegate maintained that no mention of the concessions of the Khedive and the Firmans of the Sultan should be made in the preamble because they affected only merchant vessels, whereas the task of the conference was to draw up regulations for the passage of vessels of war. In his further opinion, which was expressly concurred in by the delegate of Austria-Hungary, the delegates assembled were not authorized to give sanction to the concessions and Firmans in question, and any mention of them in the preamble might indicate an indirect recognition of the respective acts.³¹ The French delegate declared that, out of respect for the regard of the Ottoman Porte for historical truth, mention should be made in the preamble of "the concessions of His Highness the Khedive" and "the firmans granted by His Imperial Majesty the Sultan," but conceded the forcefulness of the British delegate's views.³² The delegate of Austria-

²⁶ The Suez Canal Problem, *op. cit.* 16. The relevant part reads: "[The High Contracting Parties], wishing to establish, by a Conventional Act, a definite system destined to guarantee at all times, and for all the powers, the free use of the Suez Maritime Canal, and thus to complete the system under which the navigation of this canal has been placed by the Firman of His Imperial Majesty the Sultan, dated the 22nd February, 1866 (2 Zilkadé, 1282), and sanctioning the Concessions of His Highness the Khedive . . ."

²⁷ See Correspondence respecting the Suez Canal International Commission with the Protocols and Procès-Verbaux of the Meetings, Egypt No. 19 (1885), State. C. 4599 (1885).

²⁸ Extract from a Despatch from Earl Granville to Her Majesty's Representatives at Paris, Berlin, Vienna, Rome, and St. Petersburg, Jan. 3 1883, Respecting the Suez Canal, etc. Egypt No. 10 (1885), State. C. 4335 (1885).

²⁹ Correspondence respecting the Suez Canal International Commission with the Protocols and Procès-Verbaux of the Meetings, Egypt No. 19 (1885), State. C. 4599 (1885), p. 89.

³⁰ *Ibid.*

³¹ *Ibid.* 89-90.

³² *Ibid.* 237.

Every one was at first of the opinion that the Subcommission was not only charged with the task of "confirming" the existing system, but was also to "extend" or "complete" it, but, after hearing the views expressed by the British and French delegates, veered towards the British delegate's point of view.³³

When the full Commission considered the draft text, no material changes were made in it and no statements or declarations were further made which would in any manner alter the sense or *vœu* of the Subcommission.³⁴ Also, in the ensuing negotiations and diplomatic exchanges which finally led to the signing of the Convention on October 29, 1888, at Constantinople, no further discussion of the preamble appears to have taken place.³⁵ With minor alterations in wording, there is no material difference in the texts of the 1885 draft and the 1888 Convention.³⁶

The International Status of the Suez Canal Company as Affected by the Declaration of 1873

Another international instrument cited as conferring an international status upon the Suez Canal Company is the Declaration made in 1873 by the Turkish Government.³⁷ In that year an International Commission met at Constantinople pursuant to an invitation by the Turkish Government to the maritime Powers to consider the question of the measurement of the tonnage of ships and the question of tolls. The Final Report of the Commission, which was formally drawn up and signed at Constantinople on December 18, 1873, had attached to it two declarations made by the Turkish delegate, which stated, *inter alia*:

[The first delegate of Turkey . . . having been thereto authorized by his Government [declared]. . . .

2. That no modification, for the future, of the conditions for the passage through the Canal shall be permitted, whether in regard to the navigation toll or the dues for towage, anchorage, pilotage, etc., except with the consent of the Sublime Porte, which will not take any decision on this subject without previously coming to an understanding with the Principal Powers interested therein.³⁸

All the delegates subsequently declared that they had been authorized by their governments to accept the provisions of the arrangements concluded except for certain reservations made by the delegate of Holland. It has

³³ *Id.*, 49.

³⁴ See *ibid.* 237-243.

³⁵ See 79 Brit. and For. State Papers (1887-1888) 498-534; also Correspondence respecting the proposed International Convention for Securing Free Navigation of the Suez Canal, Egypt No. 2 (1889), State. C. 5673 (1889).

³⁶ See text of 1885 draft, *supra*, p. 282, and text of 1888 Convention, note 23 *supra*.

³⁷ O. patch from the British Delegates on Tonnage at Constantinople, together with the Report and Recommendations of the Commission as to International Tonnage and the Suez Canal Dues. Commercial. No. 7 (1874), C. 943 (1874); The Suez Canal, *op. cit.* 45.

³⁸ O. patch, cited above, p. 11. The Members of the Commission, in their order of signature were: Germany, Austria-Hungary, Belgium, Spain, France, Great Britain, Greece, Italy, Holland, Russia, Sweden and Norway, and Turkey.

been asserted that the above Declaration was a "clear recognition and confirmation" of the interest of the user countries in the conditions of operation of the Canal.³⁹ The fatal defect in the rationale of "clear recognition and confirmation" lies in that fact that, if in fact the Suez Canal Company until then did not have an international status in the technical sense, then a condition precedent for the application of public international law would not have been fulfilled.

However, the Turkish Declaration is also susceptible of another interpretation. Under the so-called "Ihlen doctrine" enunciated by the Permanent Court of International Justice in the case of *The Legal Status of Eastern Greenland*,⁴⁰ the Declaration constituted legally binding international obligations upon the Ottoman Porte, and hence upon Egypt. In the *Eastern Greenland* case, the Norwegian Minister of Foreign Affairs (Mr. Ihlen) had made a statement to the Danish Minister to the effect "that the Norwegian Government would not make any difficulties in the settlement of this question [concerning the status of Greenland]." ⁴¹ The Permanent Court of International Justice held that the Norwegian Government was bound by the Ihlen Declaration. It might be contended that the Declaration of the Turkish Government in 1873 established *per se* an objective international status for the Suez Canal Company and that public international law would be applicable. In other words, notwithstanding the fact that the Suez Canal Company is an Egyptian company, the Declaration took the company out of the exclusive domestic jurisdiction of Egypt and made it a "subject" of international law. As the Permanent Court of International Justice has also declared in the case of *The Tunis and Morocco Nationality Decrees*,⁴² the dividing line between domestic jurisdiction of the state and its international obligation is an essentially relative question. Therefore, the nationalization of the Suez Canal Company was a violation of the international obligations of Egypt in that it altered in a material manner the conditions of operation of the Canal.

International Factors Bearing on the International Status of the Suez Canal Company

In addition to the express references made to international agreements discussed elsewhere in this article, various other international factors have also been adduced to establish the unique status of the Suez Canal Company. One consequence of such a status has already been discussed; namely, the applicability of public international law to it. Another consequence contended for appears to be that such an international company with its unique status would not be subject to nationalization. Whether this would flow from a rule of public international law or as an exception to the municipal law respecting nationalizations is not made expressly clear. Thus, the French representative pointed out that during the period 1856-1956, the Egyptian Government had concluded more than a hundred agreements with the company "as it would have done with a foreign

³⁹ U.N. Doc. S/P.V. 735, p. 3 at p. 5.

⁴¹ *Ibid.* 71.

⁴⁰ P.C.I.J., Ser. A/B, No. 53.

⁴² P.C.I.J., Ser. B, No. 4.

also that the Egyptian Government had not applied the following laws to the Suez Canal Company: the Egyptian customs law; the 1947 law on the repatriation of assets of companies, and the law regarding the composition of Egyptian companies.⁴³ It is further asserted that the company is international by virtue of its capital, which is made up of securities issued in eight European capitals and printed in five languages; by virtue of its board of directors, which includes representatives of many nationalities; and above all by virtue of its purpose, which is the operation of a public service of value to the entire world.⁴⁴

The Court of Alexandria is reported to have stated in 1940 that

Other undertakings have a purely national purpose, while that of the Canal Company is primarily universal in character, affecting the interests of all nations.⁴⁵

It is also claimed that Egypt does not now have the right of a grantor of an international public service which had been conceded in the latter half of the nineteenth century by the principal European Powers.⁴⁶

Under international law, *lege lata*, it does not appear that these internationalizing factors, however important and valid they may be, can prevent the application of public international law to the present controversy. In its judgment in the *Serbian Loans Cases* in 1929, the Permanent Court of International Justice said:

Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.⁴⁷

Also, in a report of the League of Nations Committee for the Study of International Loan Contracts made in 1939, the Committee was of the view that

Every contract which is not an international agreement—i.e., a treaty between States—is subject (as matters now stand) to municipal law.⁴⁸

However, it is believed that these internationalizing factors, inherent in concessions of international importance, constitute cogent and persuasive arguments for the application of public international law. They constitute "points of contact" or "connecting factors" which a municipal or an international tribunal, applying established rules of conflict of laws, must take into consideration in trying to find and apply the proper law of the contract or transaction.⁴⁹ It is arguable that, in the light of these facts

⁴³ U.N. Doc. S/P.V. 735, pp. 17, 18. For some of the instruments mentioned, see *Annuaire Chronologique des actes constitutifs de la Compagnie Universelle du Canal Maritime de Suez* (1939).

⁴⁴ U.N. Doc. S/P.V. 735, pp. 17, 18.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at 19.

⁴⁷ P.C.I.J., Ser. A, Nos. 20/21 at p. 41; see also *Brazilian Loans Case*, P.C.I.J., Ser. A, No. 20.

⁴⁸ League of Nations Doc. C.145. M.93. 1939. 2.A., p. 21 ([May 12] 1939).

⁴⁹ See generally, e.g., 2 Beale, *Conflict of Laws* 1042 ff.; Dicey's *Conflict of Laws* 519 ff. (6th ed., 1949); G. C. Cheshire, *International Contracts* (Gloucester, 1933);

nationalizing factors, "the general principles of law recognized by civilized nations" ought not to allow the application of Egyptian law only, but that the rights of the parties should be governed by public international law. Where a concession agreement calls for continuing performance over a long period, it transcends the bounds of mere legal rights and legal obligations, especially when that performance has been faithfully discharged by the concessionaire.⁵⁰

The Law Applicable to the Suez Canal Company: Its Submission to Egyptian, French and Other Applicable Laws

The Government of France has also contended that, because of its unique status, the Suez Canal Company is amenable not solely to Egyptian law, but also to French and international law.⁵¹ The main significance of the applicability of these various laws has already been noted above. It is proposed here to examine generally what laws, other than public international law, might be applicable, and in what jurisdictions proceedings might be instituted.⁵²

It was generally recognized at the time that the Khedive of Egypt, under the suzerainty of the Ottoman Porte, had legal capacity to grant the concessions for the construction of the Canal, subject to ratification by the Porte.⁵³ Both the original concessions agreement and the second "definitive" one modifying it were in the form of a unilateral grant signed only by the Khedive of Egypt, which expressly stipulated that the concessions were subject to ratification by the Ottoman Porte, in compliance with formalities of Turkish law.⁵⁴ Negotiations for the ratification lasted ten years. Finally, the French Ambassador at Constantinople, upon instructions of the French Ministry of Foreign Affairs, in concert with a Minister of the Ottoman Porte, was instrumental in preparing a third concession agreement signed on February 22, 1866, which confirmed the two earlier ones. The last one was in the form of a bilateral agreement between the Khedive of Egypt and the Suez Canal Company represented

F. A. Mann, "The Law Governing State Contracts," 21 Brit. Year Bk. of Int. Law 11 ff. (1944); P. C. Jessup, A Modern Law of Nations 139 (1944); F. A. Mann, "The Proper Law of the Contract," 3 International Law Quarterly 60-73 (1950); J. H. C. Morris, "The Proper Law of a Contract: A Reply," *ibid.* 197-207; F. A. Mann, "The Proper Law of the Contract: A Rejoinder," *ibid.* 597-604.

⁵⁰ See *infra*, pp. 289 ff.

⁵¹ U.N. Doc. S/P.V. 735, pp. 17, 18; also see decisions of the Egyptian Mixed Courts recognizing the special status of the Suez Canal Company, e.g., *Compagnie Universelle du Canal Maritime de Suez v. Campos*, Egypt, Cour d'Appel Mixte, 1947, 59 Bulletin de Législation et Jurisprudence Egyptiennes (Pt. 2) 219; *Credit Alexandrin v. Compagnie Universelle du Canal Maritime de Suez*, Egypt, Cour d'Appel Mixte, 1940, 52 *ibid.* (Pt. 2) 185.

⁵² On the legal status of the Suez Canal Company generally, see 1 Fauchille, *Traité de Droit International Public* (Pt. II) 294-339 (1925); 2 La Pradelle et Politis, *Recueil des Arbitrages Internationaux* 355 (1932).

⁵³ See Schonfield, *The Suez Canal in World Affairs* 20 (1953).

⁵⁴ See *The Suez Canal Problem*, *op. cit.* 3, 9.

by Mr. de Lesseps.⁵⁵ It was not in the form of a treaty, and was confirmed by a Firman of the Ottoman Porte of March 19, 1866.⁵⁶ Juridically, the two earlier agreements were invalid without the ratification of the Porte. However, Mr. Ferdinand de Lesseps, after the establishment of the Suez Canal Company, commenced construction of the Canal before their ratification. The Ottoman Porte was of the view that his action was illegal and in 1863 demanded that Mr. de Lesseps cease construction under threat of use of force, although the Khedive of Egypt had at least acquiesced in his action. It was only with the intervention of Napoleon III, the Emperor of France, that the dispute was settled in 1864.⁵⁷

In these various agreements the terms "*le contrat*," "*convention*," "*Actes de concession*," were used interchangeably. Mr. de Lesseps referred to the concession agreements as a simple "contract," a "public contract" and a "contract ratified by the *Firman* of the Suzerain Power," and as a "bilateral contract." The term "*firman* of concession" has also been used. (Under the Charter (*Statuts*)⁵⁸ of the company which was annexed to the Firman of the Viceroy of Egypt in 1856, the company was constituted, with the approval of Egypt, as a joint-stock company (*Société anonyme*) "analogous to joint-stock Companies authorized by the French Government, and governed by the principles of the latter companies."⁵⁹ The Charter further provided that the company, although it would have its seat (*siège social*) at Alexandria, was to have its administrative headquarters (*domicile administratif*) in Paris and was to submit to suit (*attributif de juridiction*) in that city.⁶⁰ The 1866 Concession Agreement further provided that the company, "being Egyptian, is governed by the laws and customs of the country."⁶¹ (Questions involving the status and internal affairs of the company were to be governed by French law applicable to joint-stock companies, and were in the first instance to be submitted to arbitrators in France, "subject to appeal, as over-arbitrator, to the Imperial Court in Paris." Disputes in Egypt between the company and third parties were to be governed by local law and by treaties, applied by local tribunals. Disputes arising between the company

⁵⁵ See Correspondence relative to the Question of the Suez Canal, with the Procès-Verbaux of the Meetings held by the International Commission at Constantinople. Commercial. No. 19 (1874), C.1075 (1874), pp. 7-8.

⁵⁶ See Recueil chronologique des actes constitutifs de la Compagnie Universelle du Canal Maritime de Suez 45 (Cairo, 1930).

⁵⁷ See Schonfield, *op. cit.* 40; 1 Fauchille, *Traité de Droit International Public* (Pt. II) 294-304 (1925); Sentence Arbitrale de S. M. Napoleon III, Empereur des Français (6 Juillet 1864), Recueil . . . de la Compagnie Universelle du Canal Maritime de Suez, *op. cit.* 35; Sentence Arbitrale de l'Empereur des Français, sur le Compromis relatif au Canal de Suez, le 6 Juillet 1864, 55 Brit. and For. State Papers (1864-65) 1005-1021 (1870).

⁵⁸ See Statuts de la Compagnie Universelle du Canal Maritime de Suez, le 5 Janvier, 1856 (hereinafter referred to as "*Statuts*"), 55 Brit. and For. State Papers (1864-65) 981, 985 (1870); Recueil . . . de la Compagnie Universelle du Canal Maritime de Suez, *op. cit.* 12-27; The Suez Canal, *op. cit.* (note 1 above) 11.

⁵⁹ Statuts, Arts. 1, 73.

⁶⁰ Statuts, Art. 73.

⁶¹ Concession Agreement of Feb. 22, 1866, Art. 16. The Suez Canal Problem, *op. cit.* 15.

and the Egyptian Government were to be submitted to local courts applying local law. Where all the parties were foreigners, litigation between them would be conducted "according to established rules."⁶²

Conclusion [Analytically, the applicable law would be Egyptian, French, and extra-territorial law under the capitulatory system,⁶³ as well as other applicable law in accordance with established rules of conflict of laws. Even if the dispute were tried before an international tribunal applying public international law, as Judge Manley O. Hudson has observed,

the general principles of law recognized by civilized nations [may] include some principles of private international law.⁶⁴

It was early established that interpretation of the terms of the concession agreements would be solely within the jurisdiction of the Egyptian courts. Thus on October 28, 1872, the Tribunal of Commerce of the Seine handed down a decree in favor of the French company *Messageries Maritimes*, which had instituted an action in that tribunal to contest the right of the Suez Canal Company under the 1856 Concession Agreement to change the manner of levying tonnage dues. Mr. de Lesseps contested the jurisdiction of any foreign tribunal to interpret the provisions of the Concession Agreement.⁶⁵ The Ottoman Porte concurred by stating that

the Suez Canal Company, whose principal seat is established at Alexandria, is Egyptian, and as such is amenable to the laws and customs of the Empire.⁶⁶

Upon appeal, the case was dismissed on technical grounds.⁶⁷

[In 1874, for the first time, the construction of the term "local tribunals" was raised on the issue whether disputes involving the Suez Canal Company were to be heard before the French Consular Court or before the local Egyptian courts. An Egyptian company had instituted suit against the Canal Company in the Mixed Tribunal of Commerce at Alexandria. Since the opening of the Canal for traffic, all actions against the Suez Canal Company as defendant had been tried in the French Consular Court, although when the company was the plaintiff, actions were brought in the local courts when the defendants were foreigners or Egyptians.⁶⁸ During this early formative period both the French and British governments were of the view that the Suez Canal Company was Egyptian, and was subject to the jurisdiction of local Egyptian courts.⁶⁹ The Suez Canal Company eventually submitted to the jurisdiction of local Egyptian courts.

According to the Egyptian Government,⁷⁰ in more recent times, specifi-

⁶² *Ibid.*

⁶³ On the Mixed Courts of Egypt generally, see Brinton, *The Mixed Courts of Egypt* (New Haven, 1930).

⁶⁴ Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942*, p. 621 (1943).

⁶⁵ See Correspondence relative to the Question of the Suez Canal, with the Procès-Verbaux of the Meetings . . . Commercial No. 19 (1874), C.1075, pp. 20, 30, 83-84.

⁶⁶ *Ibid.* 21.

⁶⁷ *Ibid.* 165.

⁶⁸ *Ibid.* 8.

⁶⁹ *Ibid.* 15-16, 80-81.

⁷⁰ U.N. Doc. S/P.V. 736, pp. 1, 6; see also *Comp. des Messageries maritimes v. Comp. Universelle du Canal Maritime de Suez*, Sirey, Rec. Per., 1874, I, 145; Cie. Havraise

cally in 1925, 1931, 1939,⁷¹ and in 1942, the United Kingdom Government had recognized the Egyptian national character of the Suez Canal Company and its submission to Egyptian law. The Suez Canal Company maintains an office both at London and at New York City. New York law requires that a foreign corporation doing business in New York must first obtain a certificate of authority from the Secretary of State before it can legally transact business.⁷² There is also procedure available in New York for the appointment of a receiver of domestic assets of a foreign corporation that has been "liquidated or nationalized."⁷³ No reported case has been found as yet adjudicating the extraterritorial effect of the Egyptian nationalization decree.⁷⁴

III. THE NATURE AND LEGAL STATUS OF CONCESSION AGREEMENTS

Agreements between the government of a state and an individual or business association not possessing the nationality or the national character of that state, as in the case of the concession agreements of the Suez Canal Company, are of recent development in international law. It is only in still more recent times that international arbitrations and decisions involving expropriations or nationalizations of such concessions, owned wholly or predominantly by foreign nationals, can be found. Oil in the Middle East, Latin America and Africa, and basic minerals and other extractive products in all parts of the world are exploited under the concessions system. The vital effect which concessions have upon world economy, and in other spheres, warrants at least a brief consideration of the nature and legal status of concession agreements.

Péninsulaire v. Cie. du Canal Maritime de Suez, Feb. 15, 1924, Court of Appeal of Paris, Dalloz, Rec. Heb., 1924, p. 189; *Case of Debbah et Consorts*, June 4, 1925, Mixed Court of Appeals of Alexandria, 37 Bulletin de Législation et Jurisprudence Egyptiennes (Pt. II) 466; *J. Shallam & Sons v. Compagnie Universelle du Canal Maritime de Suez*, June 18, 1931, Mixed Court of Appeal of Alexandria, 23 Gazette des Tribunaux Mixtes d'Egypte (1932-1933) 304, Annual Digest and Reports of Public International Law Cases, 1931-1932, Case No. 137; *Crédit Alexandria v. Hoirs Setton et Consorts*, Sept. 26, 1940, 52 Bulletin de Législation et Jurisprudence Egyptiennes (Pt. II) 185; *Case of Guiseppe Campos et Consorts*, May 17, 1947, 59 *ibid.* (Pt. II) 219.

⁷¹ See text of excerpt alleged by the Egyptian Government to be from Memorandum of the Agent of the British Government to the Mixed Court of Appeals of Alexandria in 1939, in U.N. Doc. S/P.V. 736, pp. 1, 5-6. The outcome of the case is not stated. The statement, on its face, appears rather damaging to the British case, especially the following language: "It [the Suez Canal Company] is Egyptian because it is granted a concession which has for its object Egyptian public assets and because its legal principal centre is in Egypt. It would be a legal anomaly to consider the Company at one and the same time Egyptian and non-Egyptian, i.e., universal. Such definition contradicts the general principles of law."

⁷² N.Y. General Corporation Law §210.

⁷³ N.Y. Civ. Prac. Act. § 977 (b), (b) (1), (b) (19).

⁷⁴ On extraterritorial effect of nationalizations and expropriations generally, see Edward D. Re, *Foreign Confiscations* (1951); Ignaz Seidl-Hohenveldern, *Internationales Konfiskations und Enteignungsrecht* (1952); "Problème des Internationales Konfiskations- und Enteignungsrechtes," 83 *Journal du Droit International* 380 ff. (1956); Kunz, "The Mexican Expropriations," *Contemporary Law Pamphlets*, New York University, Series 5, No. 1 (1940); Rado, "Czechoslovak Nationalization Decrees—Some International Law Aspects," 41 *A.J.I.L.* 795 ff. (1947).

311 The more recent nationalizations of major economic concessions, for example, the Anglo-Iranian Oil Company, the Patino tin mines in Bolivia, and now the Suez Canal Company, have a deterrent effect on international investments by nationals of capital-exporting countries in economically undeveloped areas which are necessary for world economic progress. It is believed that there should be adopted a rule *sui generis* applicable to concessions based upon "general principles of law recognized by civilized nations" which would not subject them to any particular system of private law, but to public international law, the law of nations. *J*

In the award given in 1930 in the *Lena Goldfields Ltd., Case*, involving a concession to which the Soviet Union was at least a nominal party, it was stated:

But it was submitted by him [counsel for Lena] that for other purposes the general principles of law such as those recognized by Article 38 of the Statute of the Permanent Court of International Justice at the Hague should be regarded as "the proper law of the contract" and in support of this submission counsel for Lena pointed out that both the Concession Agreement itself and also the agreement of June, 1927, whereby the coal mines were handed over, were signed not only on behalf of the Executive Government of Russia generally but by the Acting Commissary for Foreign Affairs, and that many of the terms of the contract contemplated the application of international rather than merely national principles of law. In so far as any difference of interpretation might result the Court holds that this contention is correct.⁷⁵

The nationalization of the Suez Canal Company is, therefore, an *a fortiori* case. Also, in the award given in 1951 by Lord Asquith in the arbitration between Petroleum Development (Trucial Coast), Limited, and the Ruler of Abu Dhabi, respecting a declaration in the concession agreement that "[the parties] base their work in this Agreement on goodwill and sincerity of belief and on the interpretation of this Agreement in a fashion consistent with reason," the arbitrator concluded that the terms of the concession prescribed "the application of principles rooted in the good sense and common practice of civilized nations—a sort of 'modern law of nature.'"⁷⁶ The proposal of an International Loans Tribunal, annexed to the report of the League of Nations Committee on International Loan Contracts of May 12, 1939, included a provision that the tribunal should adjudicate

on the basis of the contracts concluded and of the laws which are applicable . . . as well as on the basis of the general principles of law.⁷⁷

The gap on this subject in the present legal order of the world community has been recognized in the *Survey of International Law* prepared by the Secretariat of the United Nations in 1949 for the use of the International Law Commission, which states that "while the principle of respect for

⁷⁵ 36 Cornell L. Q. 42, 50 (1950).

⁷⁶ 68 Law Quarterly Review 28-30 (1952).

⁷⁷ Report of the League of Nations Committee on International Loan Contracts, League of Nations Doc. C.145.M.93. 1939. II.A, at p. 41.

private rights forms part of international law, there is no adequate measure of certainty with regard to its application to various categories of private rights" such as those founded "in concessionary contracts."⁷⁸

✓ The term "concession" is not a term of art, and in the general sense embraces franchise, approbation, license, patent, charter, monopoly, grant, admission and concession.⁷⁹ There is a variety of opinion regarding its nature. Gidel, citing the definition of Aucoc,⁸⁰ defines a concession as

a contract by which one or several persons are engaged to execute certain work in consideration of being remunerated for their effort and expenses, not by a sum of money paid directly to them by the administration after the completion of the work, but by the receipt of a return levied for a more or less lengthy period of time on the individuals who profit from the work.⁸¹

Mosler defines a concession as "the grant to an individual of rights under municipal law which touch public interest," and states that beyond this the term "concession" has no fixed legal meaning.⁸² Keith observes that treaty practice has been to treat a concession as merely a form of private contract.⁸³ In 1927, the German representative on the Permanent Mandates Commission declared that a concession was a one-sided right which depended on the sovereignty of the state, that the conditions of the concession were similar to those of a private contract, and assimilated it to European administrative contracts to which a government was a party. In his opinion, a concession might not be altered except to the advantage of the state.⁸⁴ The Report of the Transvaal Concessions Commission of 1901 did not define the term "concession" but proceeded to treat concessions as forms of administrative contracts.⁸⁵

Concessions granted by the Soviet Union to foreigners during the period 1922-1927 were treated as exemptions from the prevailing legal order. It was stated:

. . . [A] concession is a contract of the sovereign government with its class enemy—a foreign capitalist. . . . From the legal point of view, a concession implies an element of exemption from the general regime established by law. A concessionaire is granted rights with regard to the exploitation of the object of concession (in industries, concessions with regard to the industrial enterprise) which under general laws are not granted to a private business.⁸⁶

✱ Juridically, the term "concession" might signify (1) in international law, a grant by one state to another of political rights within its territory,

⁷⁸ U.N. Doc. A/CN.4/1/Rev. 1, p. 28 (1949).

⁷⁹ See, generally, Feilchenfeld, 4 Encyclopedia of the Social Sciences 154.

⁸⁰ Aucoc, Conférence sur les Droits administratifs, Vol. II, p. 269.

⁸¹ Gidel, Des Effets de l'Annexion sur les Concessions 123 (1904).

⁸² Hermann Mosler, Wirtschaftskonzessionen bei Änderung der Staatshoheit 79 (1943).

⁸³ Arthur B. Keith, The Theory of State Succession with Special Reference to English and Colonial Law 66.

⁸⁴ Official Records of the Permanent Mandates Commission, Session XII (1927), pp. 156-157.

⁸⁵ Brit. Parl. Papers, Cd. 623, 624 and 625.

⁸⁶ Vladimir Gsovski, Soviet Civil Law, Vol. II, p. 68, citing Karass, Concession, Magerovsky, Fundamentals of Soviet Law 356, 358 (in Russian, 2d ed., 1929).

as in the case of international concessions in China;⁸⁷ or (2) in municipal law, a grant of exclusive or non-exclusive rights, privileges or franchise, affecting public interest, to an individual, a public or private corporation, a state or other governmental body, or a mixed "public-private" corporation with the state and the private party as joint concessionaires.⁸⁸ The second group embraces grants or concessions made under the terms of international treaties,⁸⁹ and grants by the state, in the free exercise of its sovereignty or public powers, for the purpose of making attractive conditions for the investment of foreign capital by giving special privileges to the concessionaires in the form of tariff and tax exemptions, right of eminent domain, the guarantee of a minimum return on the capital invested, *et cetera*.

Buell attributes the existence of concessions partly to the insistence of foreign investors upon controlling the expenditure of money lent for industrial purposes. This control usually takes the form of a concession, which is

a privilege granted by a government to an individual or group, of developing certain resources or of constructing certain public works.⁹⁰

Concessions of this type were granted by governments in the Balkan countries, in the Near East, in China, in Mexico and throughout Latin America.

Generally, the concession or grant is of economic rights of a public or semi-public character, with or without consideration, over a defined area, for a definite or indefinite period of time, ranging from as short as 4 or 5 years to 30, 50, 70, 99 years or in perpetuity, by a governmental body which may be a unitary state, a component state, a federation, a province, a district or a municipality or a native chief of a colony.

An outstanding characteristic of the concession is that the grant is not made under legal compulsion, but at the absolute discretion of the conceding state. If this element of discretion is lacking, then in the strict sense, the grant is not a concession. That political pressure and indirect means might have been exerted to secure the grant does not necessarily invalidate the concession if the laws of the conceding state have been complied with.

The subject-matter of concessions falls into two main categories: (1) public utilities and (2) the exploitation of natural resources. Almost any kind of economic activity may be the subject of a concession. The exploitation of natural resources covers petroleum and other hydrocarbons, minerals, coal, timber, rubber, agricultural products and others too numerous to mention. In the public utilities field they embrace cables, tele-

⁸⁷ See W. W. Willoughby, *Foreign Rights and Interests in China* (Baltimore, 1930).

⁸⁸ See generally, A. Blondeau, *La Concession de Service Public* (Paris, 1933); R. Bullrich, *La Naturaleza Jurídica de la Concesión de Servicios Públicos*; Philippe Develle, *La Concession en Droit International*.

⁸⁹ See, e.g., Act of Algeciras, signed April 7, 1906, 24 Hertslet, *Commercial Treaties* 742; English translation in 2 Malloy, *Treaties of the United States* 2157, 2178; 1 A.J.I.L. Supp. 47 (1907).

⁹⁰ Raymond L. Buell, *International Relations* 397-398 (1925).

graphs, shipping, roads, air transportation and the transportation of pilgrims, to mention but some of them. The concession may also be a monopoly on canal building, import and export trade or may be general commerce. The Suez Canal was a monopoly.⁹¹ In the more important concessions the principal grant may be supplemented by auxiliary rights, such as rights over land, right of eminent domain, exemption from taxation and customs dues for a stipulated period or for the duration of the concession, right to exploit mines together with the operation of railways, stations and other appurtenances.

(No legal significance can be attached to the term applied to the instrument embodying the concession.) Thus, in 1670 King Charles II issued a "Royal Charter" for incorporating the Hudson's Bay Company, granting "unto them [the grantees] and their successors the sole trade and commerce of all those seas, straits, bays etc."⁹² In 1825, there was an "Act of the British Parliament Relative to the Levant Company" which repealed certain acts relating to the Governor and Company of Merchants of England trading to the Levant Seas.⁹³ In 1838 there was a "Crown Grant" to the Hudson's Bay Company of the exclusive trade with the Indians in certain parts of North America.⁹⁴ In 1827 there was signed a "contract" by the "Supreme Government of the federal republic of Central America, of the one part, & Charles de Beneski agent of the New York Company of the other part" for the construction of a canal.⁹⁵ For the operation of its cables, the Submarine Telegraph Company received a "Charter" from the British Government in 1853;⁹⁶ a telegraph "Convention" with France;⁹⁷ and a "Concession" from the King of Denmark in 1857.⁹⁸ The British Administration in Palestine during the period of the Mandate entered into "An Agreement" for the Tiberias Baths concession;⁹⁹ a "Deed" of concession for the extraction of salts and minerals in the Dead Sea;¹⁰⁰ and a "Convention" regulating the transit of mineral oils of the Iran Petroleum Company through Palestine.¹⁰¹ In 1933 the Persian Government and the Anglo-Persian Oil Company concluded an "Agreement" embodying the oil concession.¹⁰² The French text of the agreement employed "Convention" interchangeably with "concession" and the British Memorial in the *Anglo-Iranian Oil Company* case submitted to the International Court of Justice¹⁰³ referred to the 1933 Agreement as the

⁹¹ See Opinion of the Egyptian Conseil d'Etat, May, 1883, in 10 *Journal de Droit International Privé* (Clunet) 321 (1883).

⁹² 33 Brit. and For. State Papers (1844-45) 1364-1376.

⁹³ 12 *ibid.* (1824-25) 531-535.

⁹⁴ 33 *ibid.* (1844-45) 1377-1382.

⁹⁵ 3 Manning, *Diplomatic Correspondence of the United States, Inter-American Affairs*, 1831-1860, p. 94.

⁹⁶ 56 Brit. and For. State Papers (1865-66) 1865.

⁹⁷ *Ibid.* 348.

⁹⁸ *Ibid.* 368.

⁹⁹ Report [to the Permanent Mandates Commission] on the Administration of Palestine and Transjordan for the year 1929, p. 194.

¹⁰⁰ *Ibid.* 182.

¹⁰¹ *Idem.* for the year 1930, p. 230.

¹⁰² League of Nations Official Journal, 1932, pp. 289 ff.

¹⁰³ *Anglo-Iranian Oil Company Case—Pleadings, Oral Arguments, and Documents* 74 ff. (I.C.J., 1952).

"Concession Convention" which had a double character: on the one hand, as a "contract" operating between the Iranian Government and the Anglo-Iranian Oil Company, and on the other hand, as an "implied agreement" between the Iranian and British governments, fully operative as creating an obligation in international law. The International Court of Justice, however, rejected this contention.¹⁰⁴ The general practice in Latin American countries requires that a concession agreement be ratified by the legislature, and it is termed a "contract *ad referendum*."¹⁰⁵

A number of international arbitral and World Court decisions involving concession agreements have almost invariably upheld the binding legal obligations which arise under such agreements.

An outstanding arbitration was the *Delagoa Bay Railway* case, in which the parties were the United States and Great Britain against Portugal, growing out of the latter's cancellation in 1889 of the railway concession in Africa. The award of compensation was made by three Swiss jurists in 1900.¹⁰⁶ This case is of special interest because, though the railway company was Portuguese, the beneficial ownership was in the hands of British and American nationals.¹⁰⁷

The *Delagoa Bay Railway* case was relied on in the *El Triunfo* case before a United States-El Salvador arbitral tribunal in 1902.¹⁰⁸ In this case, compensation was awarded to American nationals, who were beneficial owners of a concession operated by a Salvadoran company with respect to steam navigation in the port of El Triunfo, after the cancellation of the concession by El Salvador. The Tribunal stated, *inter alia*:

It is abhorrent to the sense of justice to say that one party to a contract, whether such party be a private individual, a monarch, or a government of any kind, may arbitrarily, without hearing and without impartial procedure of any sort, arrogate the right to condemn the other party to the contract, to pass judgment upon him and his acts, and to impose upon him the extreme penalty of forfeiture of all his rights under it, including his property and his investment of capital made on the faith of that contract.¹⁰⁹

The abortive Treaty of Peace with Turkey, signed at Sèvres, August 10, 1920,¹¹⁰ contained in Articles 310-315 elaborate provisions concerning concessions granted by the Turkish Government before October 29, 1914. These provisions served as the basis of the Protocol Relating to Certain Concessions Granted in the Ottoman Empire, concluded at Lausanne on

¹⁰⁴ Anglo-Iranian Oil Co. Case (Jurisdiction), Judgment of July 22, 1952, [1952] I.C.J. Rep. 93 at 112; 46 A.J.I.L. 737 at 748 (1952).

¹⁰⁵ See, e.g., Sales of British-owned railways in Argentina and Uruguay, Brit. Parl. Papers, Cmd. 7405, 7629; Concession for the Construction of the Railroad Across the Isthmus of Panama (1847), 42 Brit. and For. State Papers (1852-1853) 1333-1352.

¹⁰⁶ U. S. Foreign Relations, 1900, p. 903. The contentions of the parties are set out in 2 Moore, International Arbitrations 1865-1899.

¹⁰⁷ See J. M. Jones, in 26 Brit. Year Bk. of Int. Law 229-231 (1949).

¹⁰⁸ U. S. Foreign Relations, 1902, pp. 838, 857, 859, 862.

¹⁰⁹ *Ibid.* 871-872.

¹¹⁰ 29 Hertslet, Commercial Treaties 1126; 15 A.J.I.L. Supp. 179 (1921).

July 24, 1923, and brought into force in 1924.¹¹¹ In Article I of the Protocol, the British Empire, France, Italy, Greece, Rumania, the Serb-Croat-Slovene State, and Turkey, agreed that:

Concessionary contracts . . . duly entered into before the 29th October, 1914, between the Ottoman Government or any local authority . . . and nationals (including companies) of the contracting Powers, other than Turkey . . . are maintained.

Article 9 of the Protocol provides that the state acquiring territory detached from Turkey

. . . is fully subrogated as regards the rights and obligations of Turkey towards the nationals of the other contracting Powers, and companies in which the capital of nationals of the said Powers is preponderant, who are beneficiaries under concessionary contracts entered into before the 29th October, 1914, with the Ottoman Government or any local Ottoman authority.

Four cases involving the application of Article 9 were decided by the Permanent Court of International Justice—the *Mavrommatis Case* (two) in 1925,¹¹² the *Mavrommatis Jerusalem Concessions Case* in 1927,¹¹³ the *Lighthouses Case* in 1934,¹¹⁴ and the *Lighthouses in Crete and Samos Case* in 1937¹¹⁵—in each of which the maintenance of, and the subrogation to, the concessions were upheld.

In the *Mavrommatis Palestine Concessions Case* before the Permanent Court of International Justice in 1925,¹¹⁶ concessions granted by the Ottoman Government in 1914 were held to be valid,¹¹⁷ and Articles 4 and 9 of the Lausanne Concessions Protocol were held to be applicable to them. In a later case with regard to the re-adaptation of the concessions, the Court upheld a preliminary objection to its jurisdiction.¹¹⁸

In the *Lighthouses Case* before the Permanent Court of International Justice in 1934,¹¹⁹ lighthouse concessions granted by the Ottoman Government in 1913 were held to have been duly entered into and to be operative under the Lausanne Concessions Protocol of 1923 against the Greek Government. In a second case concerning *Lighthouses in Crete and Samos*, in 1937,¹²⁰ the concessions granted in 1913 were held to have been duly entered into and to be operative against Greece as a successor state under the Lausanne Concessions Protocol of 1923.

In 1924, in the case of *Germany v. the Reparations Commission*, an international award was handed down in which the term "concession" was defined. On the question whether the word "concession" as used in Article 260 of the Treaty of Versailles also included the right granted by a state to a private person or company to exercise a monopoly of production or sale of some product, as in the case of the Turkish Tobacco Monopoly, Mr. Beichmann (Norway), Arbitrator, said:

¹¹¹ 28 League of Nations Treaty Series 203; 18 A.J.I.L. Supp. 98 (1924).

¹¹² P.C.I.J., Ser. A, Nos. 2 and 5 (1925). ¹¹³ *Ibid.* No. 11 (1927).

¹¹⁴ P.C.I.J., Ser. A/B, No. 62 (1934). ¹¹⁵ *Ibid.* No. 71 (1937).

¹¹⁶ P.C.I.J., Ser. A, Nos. 2 and 5 (1925). ¹¹⁷ *Ibid.* No. 5 (1925), p. 30.

¹¹⁸ *Ibid.* No. 11 (1927).

¹¹⁹ P.C.I.J., Ser. A/B, No. 62 (1934).

¹²⁰ *Ibid.* No. 71.

In the word "concession" as it is employed in Article 260, are included grants of the right of exploitation of mines or deposits of petroleum, on condition that, according to the law of the country where they are situated, the grant has been made by the State or by an authority who relies for it on a special act and in virtue of a power in principle discretionary.¹²¹

The legal nature of a concession as a "vested" or "acquired" right was upheld in an international award in 1929 in the *Sopron Kőszeg Local Railway Company* case¹²² involving state succession, where the tribunal said, *inter alia*, that under most authorities and the international judgments which conform most nearly to modern views of international law,

the rights which a private company derives from a deed of concession cannot be nullified or affected by the mere fact of a change in the nationality of the territory on which the public service conceded is operated.

From the foregoing survey, which has necessarily been of a summary nature, it is clear that there is no agreed definition of the term "concession" in international law. Still less is there any clearly established rule in international law, either conventional or customary, that all concessions are subject to the general right of expropriation or nationalization like any ordinary private contract. The few rules that are discernible have invariably been the result of precipitous or contentious actions taken and from which a rule or principle has been adduced to explain or defend the action, rather than the result of action based upon an antecedent inquiry into the rule and the extent of its application. There is a genuine need for reasonable profits, good will, and protection against outright economic spoliation for states rich in natural resources but lacking in capital to exploit them. On the other hand, an investor who invests capital in foreign states in major concessions should also be protected against measures amounting to intransigent nationalism or rampant xenophobia. Due to the disparity of the legal and "real" status of the parties to a concession agreement, the continuing relationship over a long period of time, and the mutual interest in the prosperity of the parties in the "joint venture," there are imponderables which no legal virtuosity can guard against. A concession agreement transcends the bounds of mere legal rights and legal obligations. The balance between theoretical *de jure* power and *de facto* financial power requires clearly-established equitable principles for the guidance of the parties before they plunge into the venture.

It is believed that "progressive development and codification of international law" should take care of this gap in the present legal order of the world community, so that there can be established a stable legal regime for the economic development of economically underdeveloped countries based upon "the general principles of law recognized by civilized nations."

¹²¹ 1 Int. Arb. Awards 479.

¹²² Annual Digest and Reports of Public International Law Cases, 1929-30, Case No. 34; 24 A.J.I.L. 164 (1930).

IV. THE INTERNATIONAL STATUS AND CONTROL OF THE SUEZ CANAL

In the present controversy, the fundamental principle embodied in the Convention of October 29, 1888, guaranteeing that the Canal "shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag,"¹²³ has not been challenged. The Egyptian Government has declared its willingness to carry out the international obligations of the 1888 Convention.¹²⁴ It is objected that Egypt cannot be relied upon to have sole control and cannot be trusted in view of its past actions in blockading Israeli ships from passage in the Canal.¹²⁵ The users of the Canal have proposed the establishment of an international authority or body to take over and to operate the Canal in order to guarantee the right of freedom of passage in the Canal in accordance with the 1888 Convention,¹²⁶ which is being strenuously opposed by the Egyptian Government.¹²⁷ It is proposed to examine the problems raised from the following aspects: (a) right of freedom of passage in the Canal; (b) enforcement of the right; (c) supervision of enforcement of the 1888 Convention; and (d) legal status of the Canal.

Right of Freedom of Passage in the Canal

In the 1856 Concession Agreement, the Khedive of Egypt made a unilateral declaration that the Suez Canal "shall be open forever, as a neutral passage," to all merchant vessels on a basis of absolute equality, upon payment of the necessary fees and compliance with any regulations promulgated by the Suez Canal Company.¹²⁸ Although in municipal law such declaration might constitute an estoppel, nevertheless, it does not have the effect of neutralizing the Canal in international law. The Suez Canal Company is enjoined not to discriminate in fixing transit dues, and upon payment of such dues a merchant vessel has the right of passage.¹²⁹

In 1873, at the Tonnage Conference, a Declaration was adopted which recognized the right of warships and auxiliary naval vessels to use the Canal as well as merchant ships.¹³⁰ This in principle, at least, admitted

¹²³ Convention of Oct. 29, 1888, Art. 1. English translation in *The Suez Canal, op. cit.* 49; *The Suez Canal Problem, op. cit.* 17; 3 A.J.L.L. Supp. 123 (1909).

¹²⁴ See statement of the Egyptian representative in the Security Council, U.N. Doc. S/P.V. 736, pp. 1-14; *The Suez Canal Problem, op. cit.* 317.

¹²⁵ See, e.g., statement of U.K. representative in the Security Council, U.N. Doc. S/P.V. 735, pp. 3-17; statement of French representative, *ibid.* pp. 17-24.

¹²⁶ See Exchange of Correspondence between the Suez Committee and the President of the Republic of Egypt regarding the future operation of the Suez Canal, Cairo, Sept. 3-9, 1956, Egypt No. 2 (1956), Cmd. 9856; The Cairo Meeting of the Suez Committee with President Nasser, *The Suez Canal Problem, op. cit.* 303-351; text of Five-Power proposal of Aug. 21, 1956, *ibid.* 291-292; compromise Spanish proposal, *ibid.* 292-293.

¹²⁷ *The Suez Canal Problem, op. cit.* 317-322.

¹²⁸ Concession Agreement of Jan. 5, 1856, Art. 14. English translation in *The Suez Canal Problem, op. cit.* 7.

¹²⁹ See Art. 6 of the Concession Agreement of Nov. 30, 1854; Art. 15 of the Concession Agreement of Jan. 5, 1856.

¹³⁰ Despatch from the British Delegate on Tonnage at Constantinople, together with the Report and Recommendations of the Commission as to International Tonnage and the Suez Canal Dues, Commercial. No. 7 (1874), C.943, p. 11.

that conditions for passage in the Canal were under the protection of all Europe.¹³¹ But it was not until this right was embodied in Article 1 of the 1888 Convention that it became an international right arising under an express treaty, without cavil.) It is not proposed here to consider the important but separable issue of right of blockade.¹³²

✕ *Enforcement of the Right of Passage in the Canal*

✓ Under the provisions of Article 9 of the 1888 Convention, Egypt is entrusted with the enforcement of execution of the treaty.¹³³ It is contended that the Egyptian Government cannot be entrusted solely with this task.¹³⁴ Historically, with regard to merchant ships, the 1856 Concession Agreement provided for a special Ottoman Commissioner to superintend the company in carrying out the execution of the concession.¹³⁵ In 1874, when Mr. de Lesseps threatened to close the Canal because he felt that the recommendations made by the International Commission regarding tonnage dues were illegal, the Ottoman Porte ordered the Khedive of Egypt to use force, if necessary, to enforce those recommendations.¹³⁶

At the 1885 Conference¹³⁷ convened to establish the international system to guarantee freedom of passage for war vessels as well as merchant ships, British policy would not permit any encroachment upon the powers of the territorial sovereign, and enforcement of transit of belligerent ships in time of war was also entrusted to the Khedive. The system devised at this Conference was embodied in the 1888 Convention. Under treaty law, any change in the terms of the 1888 Convention would require the consent of the signatories. On the other hand, there is also the *clausula rebus sic stantibus* which in substance provides that, due to vital changes of circumstances, a party to a treaty might be justified in requesting a revision of the treaty on that ground.¹³⁸ It is by no means clear whether a con-

¹³¹ See consideration of this Declaration, *supra*, p. 283.

¹³² Respecting the Israeli position in the present controversy concerning blockade, see letter dated Oct. 13, 1956, from the representative of Israel to the President of the Security Council, U.N. Doc. S/3673. See also, generally, The United Nations and the Egyptian Blockade of the Suez Canal, A Study Sponsored by the Lawyers Committee on Blockades (New York, 1953); "The Security Council and the Suez Canal," 1 Int. and Comp. Law Quarterly 85 (1952); Resolution of the U.N. Security Council of Sept. 1, 1951, U.N. Doc. S/2298/Rev. 1; U.N. Docs. S/P.V. 549-553, 555-556, 558; 658-664; 682-688; S/3296-3298, S/3300, S/3302; and "Conclusions du Gouvernement Egyptien au sujet des plaintes des Gouvernements étrangers quant à la visite des navires neutres et la saisie des objets de contrebande dans les ports égyptiens," 7 Revue égyptienne de droit international 235 (1951).

¹³³ Art. 9 of the Convention of Oct. 29, 1888. The Suez Canal Problem, *op. cit.* 19.

¹³⁴ See, *e.g.*, statements of U.K. representative in the Security Council, U.N. Doc. S/P.V. 735, pp. 3-17, 9, 10; and French representative, *ibid.* 17-24, 22.

¹³⁵ See Art. 9 of the Concession Agreement of Jan. 5, 1856. The Suez Canal Problem, *op. cit.* 5-6.

¹³⁶ See Correspondence relative to the Question of the Suez Canal, with the Procès-Verbaux of the Meetings held by the International Commission at Constantinople, Commercial No. 19 (1874), C.1075, pp. 138-141, 153-154.

¹³⁷ See "Supervision of Enforcement of the 1888 Convention," *infra*, p. 299.

¹³⁸ See, *e.g.*, Harvard Research in International Law, Draft Convention on the Law of Treaties, 29 A.J.I.L. Supp. 662-663, 1096-1126 (1935); 1 Oppenheim's International

tracting party might unilaterally denounce the treaty. In 1941, the late President Roosevelt, in declaring the International Load Line Convention of 1930¹³⁹ suspended and inoperative in United States ports and territorial waters, said that he was "exercising in behalf of the United States of America an unquestioned right and privilege under approved principles of international law."¹⁴⁰

Supervision of Enforcement of the 1888 Convention

The 1888 Convention does not provide for procedures to be taken in case the right of freedom of passage guaranteed in the treaty was not enforced by Egypt, the party entrusted to do so in the first place. In this event, the general principles of international law would apply, namely, self-help, whether through diplomatic intervention or the ultimate employment of force. This lack of remedy, however, was not due to lack of foresight on the part of the framers of the treaty. Recourse to *travaux préparatoires*¹⁴¹ makes this abundantly clear.

At the 1885 International Conference which drew up the draft convention from which the 1888 Convention is derived, there was a fundamental split over the question of supervision of enforcement of any treaty drawn up guaranteeing the right of free passage in the Canal. This basically is the problem confronting the states concerned today, namely, the establishment of an international "Users Association" to operate the Canal to ensure that the substantive right guaranteed by the 1888 Convention is enforced and made effective.¹⁴² In 1885 a British proposal left to the territorial Power, the Khedive of Egypt, the enforcement of the treaty but no supervision over the manner in which Egypt would carry out this function.¹⁴³ The French Government, on the other hand, proposed the establishment of a permanent international commission, composed of the representatives of the Powers signatories of the 1883 Declaration of London, under the presidency of the Turkish delegate, with a delegate of the Egyptian Government sitting with a consultative voice.¹⁴⁴ The Italian representative also proposed that the representatives at Cairo of the Powers signatories of the Declaration of London should constitute a commission under the presidency of a special representative of Turkey.¹⁴⁵ The British delegate objected on the ground that it was incompatible with

Law 843-850 (7th ed.); 5 Hackworth, Digest of International Law 349-359; on a recent application of this clause concerning the Suez Canal, see H. W. Briggs, "Rebus sic Stantibus Before the Security Council: The Anglo-Egyptian Question," 43 A.J.I.L. 762-769 (1949).

¹³⁹ 4 U. S. Treaty Series 5287 ff. (1938).
¹⁴⁰ See 5 Department of State Bulletin 114-115 (1941); 5 Hackworth, *op. cit.* 355-356 (1943).

¹⁴¹ See Correspondence respecting the Suez Canal Commission, with the Protocols and Procès-Verbaux of the Meetings, Egypt No. 19 (1885), C.4599 (1885).

¹⁴² See, e.g., Exchange of Correspondence between the Suez Committee and the President of the Republic of Egypt regarding the future operation of the Suez Canal, Egypt No. 2 (1956).

¹⁴³ See Correspondence respecting the Suez Canal Commission . . . Egypt No. 19 (1885), C.4599 (1885), pp. 27, 48, 245.

¹⁴⁴ See *ibid.* 27, 47, 245.

¹⁴⁵ *Ibid.* 47, 245.

the bases contained in the 1883 Declaration which did not go beyond creating a system of guarantee only.¹⁴⁶

The German, Austrian, French, and Russian delegates, supported by the Turkish, and eventually by the Netherlands delegates, asserted that freedom of passage in the Canal would be an empty phrase if the territorial Power were not included in the mutual servitude which was proposed. They cited the usefulness of the International Commission for the Lower Danube.

A compromise British proposal would have made the representatives in Egypt of the Powers signatories of the 1883 Declaration watch over the execution of the treaty. The other representatives prophetically declared that in order for the proposed international system to be effective there must be supervision of a collective and permanent character.¹⁴⁷

It is readily discernible from the *procès-verbaux* of the Conference that the framers of the 1885 draft convention had not at that time foreseen that Egypt would occupy the position, nor take the step it did take in 1956. The Report of the Subcommission stated, *inter alia*:

[The supporters of the French proposal observed] that Egypt, being a vassal of the Sublime Porte, would have neither the independence nor the authority necessary for enforcing the provisions of the treaty if she were not supported in the fulfilment of her task by an instrument of supervision emanating from a European concert; that lastly, any treaty concerning the freedom of the Suez Canal must, to be effective, provide explicitly and in a tangible form for the exercise and working of a constant supervision of its provisions.¹⁴⁸

Legal Status of the Suez Canal

Under Article 10 of the 1888 Convention the Egyptian Government can take measures necessary for the defense of Egypt, including defense of the Suez Canal. Egyptian sovereignty over the Suez Canal itself has not been challenged in the present controversy.¹⁴⁹ It would appear that "imperium" and perhaps also "dominion" rest with the Egyptian Government. The Suez Canal Company was granted a concession "to operate" the Canal, but not ownership of the land over which the Canal flows.¹⁵⁰ At the end of the concession the Egyptian Government was to resume possession of the Canal without paying compensation for the Canal itself, although compensation would be paid for materials and supplies of the company.¹⁵¹ The Concession Agreement of 1866 specifically provides that "The Maritime Canal and all its appurtenances" shall remain under

¹⁴⁶ See *ibid.* 26-27, 43, 88.

¹⁴⁷ See *ibid.* 245.

¹⁴⁸ *Ibid.*

¹⁴⁹ See statements of U.K. representative, U.N. Doc S/P.V. 735, p. 3; and French representative, *ibid.*, p. 17 at p. 21.

¹⁵⁰ See, e.g., Concession Agreement of Nov. 30, 1854, Art. 1; Concession Agreement of Jan. 5, 1856, Art. 1. On the general legal status of the Suez Canal, see 1 Fauchille, *Traité de Droit International Public* (Pt. II) 294-339 (1925).

¹⁵¹ See, e.g., Concession Agreement of Nov. 30, 1854, Art. 1; Concession Agreement of Jan. 5, 1856, Art. 16; Concession Agreement of Feb. 22, 1866, Art. 15.

the jurisdiction of the Egyptian territory.¹⁵² Its nature has been described as being the same as that of a railroad monopoly then being granted in France.¹⁵³ It rather resembles a long-term lease of real property in private law where the lessor retains title.¹⁵⁴

The 1888 Convention has preserved intact Egyptian sovereignty over the Suez Canal.¹⁵⁵ At the 1885 Conference¹⁵⁶ which drew up the draft convention from which the 1888 Convention is derived, the British policy, which prevailed, would not permit any encroachment on the rights of the territorial sovereign.¹⁵⁷ The international system guaranteeing this freedom of passage has been regarded as an international servitude which did not involve any restriction of the sovereign rights of Egypt.¹⁵⁸ Previously the Ottoman Porte had expressed the view in 1872 that Mr. de Lesseps, having only the "concessions of the undertaking," did not have the right to propose the sale of the Canal to certain European Powers then interested, or to propose the establishment of an international commission to which the Porte was opposed.¹⁵⁹

Article 12 of the 1888 Convention applies the principle of equality to the use of the Suez Canal, which prohibits any of the contracting parties from seeking any territorial or commercial privileges or advantages. It further reserved "the rights of Turkey as the territorial Power."¹⁶⁰

In 1882, British military forces, with the consent of the Khedive of Egypt,¹⁶¹ had occupied Egypt for the purpose, among other things, of protecting the Canal from its threatened destruction by the rebel forces of Colonel Arabi.¹⁶² The occupation continued after the rebellion was over, with the British Government maintaining that since the occupation had taken place with the consent of the territorial Power, it was not incompatible with the concept of territorial integrity of the territorial Power, which was being upheld in the 1888 Convention.¹⁶³ In ratifying the 1888 Convention, the British Government had made reservation to the effect that insofar as the treaty was incompatible with the transitional and exceptional situation and would impede the liberty of action of the British Government

¹⁵² Concession Agreement of Feb. 22, 1866, Art. 9.

¹⁵³ See Arnold Wilson, "Some International and Legal Aspects of the Suez Canal," 21 Grotius Society Transactions 127 (1935).

¹⁵⁴ See discussion *supra*, pp. 289 ff.

¹⁵⁵ See discussion *supra*, pp. 297 ff.

¹⁵⁶ See note 141 *supra*.

¹⁵⁷ See note 143 *supra*.

¹⁵⁸ See Correspondence respecting the Suez Canal International Commission . . . Egypt No. 19 (1885), C.4599 (1885), p. 110.

¹⁵⁹ Correspondence Respecting the Suez Canal, Egypt No. 2 (1876), C.1392 (1876), pp. 161-168.

¹⁶⁰ For text of Art. 12, see 79 Brit. and For. State Papers (1887-1888) 22; The Suez Canal Problem, *op. cit.* 19; 3 A.J.I.L. Supp. 126 (1909).

¹⁶¹ See Proclamation of the Khedive respecting British Operations in the Isthmus of Suez and the Suez Canal, 74 Brit. and For. State Papers (1882-1883) 572 (1890).

¹⁶² *Ibid.* 553-604.

¹⁶³ See Correspondence respecting the Suez Canal International Commission, with the Protocols and Procès-Verbaux of the Meetings, State, Egypt No. 19 (1885), C.4599, p. 1 (1884-1885).

during the occupation of Egypt, it would consider itself free to disregard any of the terms of the convention.¹⁶⁴ In 1904, the British and French governments concluded an agreement¹⁶⁵ which put the convention into effect on the condition that the international supervisory commission for the execution of the convention¹⁶⁶ would remain in abeyance.

Upon the outbreak of the first World War, the British Government on December 18, 1914, unilaterally terminated the suzerainty of the Ottoman Porte over Egypt, and proclaimed Egypt a British Protectorate.¹⁶⁷ After its defeat in the war, under the provisions of the Treaty of Lausanne, the Turkish Government renounced "all rights and titles over Egypt" as from November 5, 1914.¹⁶⁸ Under the provisions of the Treaty of Versailles, Germany consented to the transfer to the British Government of all powers conferred upon the Ottoman Porte by the 1888 Convention, and also recognized the British protectorate over Egypt as of August 4, 1914.¹⁶⁹ Similar provisions were embodied in the Treaties of St. Germain¹⁷⁰ and Trianon¹⁷¹ concluded with Austria and Hungary respectively.

In 1922, the British Government unilaterally terminated the status of Egypt as a British Protectorate, and Egypt was declared to be an independent sovereign state,

¹⁶⁴ This reservation had been made earlier with respect to the draft 1885 convention. See Correspondence respecting the Suez Canal International Commission . . . State, Egypt No. 19 (1885), C.4599 (1884-1885); 79 Brit. and For. State Papers (1887-1888) 498-534; Correspondence respecting the proposed International Convention for Securing Free Navigation of the Suez Canal, Egypt No. 2 (1889), State. C.5673 (1889).

¹⁶⁵ See Declaration between Great Britain and France respecting Egypt and Morocco, April 8, 1904, 97 Brit. and For. State Papers (1903-1904) 39-41; Declaration between Great Britain and France respecting Egypt and Morocco, together with the Secret Articles, April 8, 1904. Art. 6 of the Declaration provides: "In order to ensure free passage of the Suez Canal, His Britannic Majesty's Government declare that they adhere to the stipulations of the treaty of the 29th October, 1888, and that they agree to their being put into force. The free passage of the Canal being thus guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of Art. 8 of that Treaty will remain in abeyance." 101 Brit. and For. State Papers (1907-1908) 1053-1059, 1056.

¹⁶⁶ For text of Art. 8 of the 1888 Convention, see 79 Brit. and For. State Papers (1887-1888) 20-21; The Suez Canal Problem, *op. cit.* 18; 3 A.J.I.L. Supp. 125 (1909).

¹⁶⁷ See Proclamation by the General Officer Commanding-in-Chief the British Forces in Egypt announcing the Establishment of a British Protectorate over Egypt, Cairo, Dec. 18, 1914, 109 Brit. and For. State Papers (1915) 436.

¹⁶⁸ See Art. 17 of the Treaty of Peace signed at Lausanne, July 24, 1923, British Treaty Series, No. 16 (1923), 117 Brit. and For. State Papers (1923) 543-591, 549; 28 League of Nations Treaty Series 12-113, 22-23; 18 A.J.I.L. Supp. 1 at 10 (1924).

¹⁶⁹ See Art. 147, Pt. IV, Sec. VI, of the Treaty of Versailles, June 28, 1919, 112 Brit. and For. State Papers (1919) 1-316, 79; 13 A.J.I.L. Supp. 151 at 222 (1919).

¹⁷⁰ See Arts. 102 and 107 of the Treaty of Peace signed at St. Germain-en-Laye, Sept. 10, 1919, 112 Brit. and For. State Papers (1919) 317-526, 363, 364; 14 A.J.I.L. Supp. 1 at 34, 35 (1920).

¹⁷¹ See Arts. 86 and 91 of the Treaty of Peace signed at Trianon, June 4, 1920, 113 Brit. and For. State Papers (1920) 486-645, 520, 521; 15 A.J.I.L. Supp. 1 at 32, 33 (1921).

while preserving for future agreements between Egypt and themselves [the British Government] certain matters in which the interests and obligations of the British Empire are specially involved.¹⁷²

The British and Egyptian governments concluded in 1936 a Treaty of Alliance¹⁷³ by which military occupation of Egypt by British forces was terminated. However, Article 8 of this treaty permitted the stationing of British military forces in the Suez Canal Zone for a period of twenty years for the purpose of defending the Canal until such time as Egyptian forces were strong enough to do it alone. It was specifically recognized that "the Suez Canal, whilst being an integral part of Egypt, is a universal means of communication as also an essential means of communication between the different parts of the British Empire"; and that

The presence of these [British] forces shall not constitute in any manner an occupation and will in no way prejudice the sovereign rights of Egypt.¹⁷⁴

A radical change in the British position in Egypt took place with the signing on July 27, 1954, of an agreement in which the British Government undertook to move out of the Suez Canal Zone within twenty months. The United Kingdom Government retained the right to use the bases in case of an "armed attack" upon Egypt or upon any of the Members of the Arab League. The agreement, which was to remain in force for seven years, recognized "the Suez Maritime Canal, which is an integral part of Egypt," as a "waterway economically, commercially and strategically of international importance." Both parties expressed "determination to uphold the 1888 Convention guaranteeing the freedom of navigation of the Canal."¹⁷⁵

V. THE MATTER OF COMPENSATION

The Egyptian decree¹⁷⁶ nationalizing the Suez Canal Company provided for the payment of the price of stock on the Paris Exchange on the day before nationalization, followed later by alternative offers to pay the average exchange price over the preceding five years, or to submit the matter

¹⁷² See Circular Despatch to His Majesty's Representatives [Abroad] . . . London, March 15, 1922, 116 Brit. and For. State Papers (1922) 84-85.

¹⁷³ See Treaty of Alliance between the United Kingdom and Egypt, signed at London, Aug. 26, 1936, British Treaty Series No. 6 (1937), Cmd. 5360, 140 Brit. and For. State Papers (1936) 179-197; 31 A.J.I.L. Supp. 77 (1937). On consideration of this treaty in the U.N. Security Council, see H. W. Briggs, "Rebus sic stantibus before the Security Council: The Anglo-Egyptian Question," 43 A.J.I.L. 762-769 (1949).

¹⁷⁴ Art. 8 of the Treaty of Alliance, 140 Brit. and For. State Papers 179 at 181 ff.; 31 A.J.I.L. Supp. 79-80 (1937).

¹⁷⁵ See Heads of Agreement, Anglo-Egyptian Defense Negotiations regarding the Suez Canal Base, July 27, 1954, Egypt No. 1 (1954), Cmd. 9230; Exchange of Notes, Oct. 19, 1954, British Treaty Series No. 14 (1955), Cmd. 9390; Exchange of Notes, Egypt No. 1 (1955), Cmd. 9466.

¹⁷⁶ Presidential Decree on the Nationalization of the Suez Canal Company of July 26, 1956. English translation in *The Suez Canal Problem*, *op. cit.* 30-32; *The Suez Canal*, *op. cit.* 41-43.

to arbitration.¹⁷⁷ In any event, payment was conditional upon the Egyptian Government's taking delivery of all the assets of the company, including those located abroad.¹⁷⁸ The states concerned have proceeded upon the assumption that the nationalization was a *fait accompli*,¹⁷⁹ and that compensation would be paid in due course,¹⁸⁰ although some doubt has been expressed as to the economic capability of Egypt to pay.¹⁸¹

✶ The Suez Canal Company has denounced the Egyptian offer to pay compensation as a "despoilment of the shareholders," and as "illusory" on the grounds that the Egyptian Government purported to nationalize the company's assets abroad, and did not define the following matters: currency in which it was payable; place or time limit of payment; procedure for making payment, or guarantee. Use of the stock exchange quotations was objected to as "inequitable" because they did not reflect the true value of the company's undertakings. The company has claimed indemnity for the value of the expropriated buildings and equipment; for expenses incurred after its nationalization, including wages paid, interest due, and amount spent in redeeming the company's capital and debentures, and also for loss suffered from the premature redemption of the concession, commensurate with the "true profit," and not merely twelve times the present profits.¹⁸²

Following upon the nationalization of the company, Egyptian assets in the United Kingdom, France and in the United States were frozen,¹⁸³ both as a precautionary and as a retaliatory measure. The French Government has refused to recognize the nationalization as legal, and has declared that it would have no effect on the property of the company in France or elsewhere outside of Egypt.¹⁸⁴ Before the Canal was closed due to military operations, shipowners had been variously instructed by their governments to pay transit dues to the Suez Canal Company, or to the new body established by the Egyptian Government, and some were uninstructed, resulting in about 50 to 60 percent of the dues being still paid to the Suez Canal Company.¹⁸⁵ Reliable financial figures are hard to come by. The stock of the

¹⁷⁷ See statement of Egyptian representative in Security Council on Oct. 8, 1956, U.N. Doc. S/P.V. 736, p. 1 at p. 3; United Nations Review, Vol. 3, No. 5, p. 46 (1956).

¹⁷⁸ Art. 1 of Presidential Decree, *loc. cit.*

¹⁷⁹ See, e.g., letter of Sept. 7 from Chairman of Suez Committee to President Nasser, in Exchange of Correspondence between the Suez Committee and the President of the Republic of Egypt . . . Egypt No. 2 (1956), p. 7.

¹⁸⁰ See, e.g., Resolution of Security Council adopted on Oct. 13, 1956, U.N. Doc. S/P.V. 743; Requirements for a Settlement of the Suez Canal Situation, United Nations Review, Vol. 3, No. 5, pp. 19 ff. (1956).

¹⁸¹ The Times (London), Aug. 2, 1956, p. 9, col. 7.

¹⁸² See The Suez Canal Company and the Decision Taken by the Egyptian Government on 26th July, 1956 (26th July-15th September 1956), pp. 5, 19, 22-23.

¹⁸³ See *ibid.* 23; New York Times, July 29, 1956, p. 1, col. 8, p. 3, col. 1; Aug. 1, 1956, p. 1, col. 1.

¹⁸⁴ The Suez Canal Company and the Decision Taken by the Egyptian Government, *op. cit.* 5. See New York Times, Feb. 13, 1957, reporting the introduction of a bill in the French National Assembly declaring the company to be a French company not subject to the laws of any foreign state.

¹⁸⁵ The Suez Canal Company, *op. cit.* (note 182) 26-27.

Suez Canal Company has been estimated by the British Government to amount to about seventy-eight million English pounds, while the company's announced estimates place them at about U. S. \$233,000,000.¹⁸⁶

As calculation of compensation is essentially a technical matter of expert accounting, it is not proposed to examine the matter in this article.¹⁸⁷ However, a reference to certain judicial decisions and the practice of states, which constitute the principal sources of international law, may be in order.

In the case of the *Chorzów Factory (Claim for Indemnity, Merits)*,¹⁸⁸ the Permanent Court of International Justice drew a clear distinction between the consequences of an expropriation which is lawful and the consequences of one which is unlawful. A lawful expropriation requires the payment only of "fair compensation" equal "to the value of the undertaking at the moment of dispossession, plus interest to the day of payment."¹⁸⁹ In case of an expropriation in violation of international law, such as breach of a concession agreement, the expropriating state, in addition to paying fair compensation, must also pay damages for loss sustained by the injured party.

As a result of extended diplomatic exchanges between the governments of the United States and Mexico in 1937 over the expropriation of oil and agrarian properties in the form of concessions granted to United States nationals, there emerged a rule of international law on compensation which generally has been accepted as accurate. In 1938 Secretary of State Hull wrote to the Mexican Ambassador in Washington:

We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit a foreign government may take property of American nationals in disregard of the rule of compensation under international law.¹⁹⁰

In a later note written in 1940 he said:

The right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement.¹⁹¹

Previously, the Netherlands Government had also declared:

that even in cases when circumstances oblige a government to expropriate private property, it is a condition *sine qua non* that the properties expropriated must be exactly defined, and that if the authority

¹⁸⁶ New York Times, Aug. 12, 1956, p. 3.

¹⁸⁷ See, e.g., G. Walker and R. H. B. Condie, "Compensation in Nationalized Industries," in *Problems of Nationalized Industry* (Robson ed.) 54-72 (1952); Note, "British Nationalization of Industry—Compensation to Owners of Expropriated Property," 97 U. Pa. L. Rev. 520 (1949); M. B. Cairns, "Some Legal Aspects of Compensation of Nationalized Assets," 16 *Law and Contemporary Problems* 594-619 (1951).

¹⁸⁸ P.C.I.J., Ser. A, No. 17 (1927).

¹⁸⁹ *Ibid.* 46-48.

¹⁹⁰ 3 Hackworth, *Digest of International Law* 656 (1942).

¹⁹¹ *Ibid.* 662.

takes immediate possession of such goods a just and prompt indemnity shall be immediately and effectively guaranteed.¹⁹²

The general view that there is an international duty to provide compensation which exists apart from the provisions of municipal law is subscribed to by a number of writers on international law, such as Whiteman,¹⁹³ Freeman,¹⁹⁴ Kaufmann,¹⁹⁵ Gidel,¹⁹⁶ Fauchille and Sibert.¹⁹⁷

After the second World War, especially during the period 1945-1950, large-scale nationalizations took place in such countries as France, Italy,¹⁹⁸ Czechoslovakia,¹⁹⁹ Yugoslavia, Poland, England,²⁰⁰ Hungary and Rumania.²⁰¹ Respecting aliens affected by such measures, the general practice in recent years has been for the nationalizing state and the state whose nationals are affected, to conclude agreements providing for the payment by the former government to the latter of a lump sum in final discharge of all the pecuniary obligations of the nationalizing state. The government of the state receiving the compensation undertakes to distribute the sum so received among its nationals affected.) The principal examples of such agreements are provided by those made by the United Kingdom with Poland in 1947,²⁰² with Yugoslavia in 1948,²⁰³ and with Czechoslovakia in 1949.²⁰⁴ Similar treaties have been concluded by the United Kingdom with France,²⁰⁵ and between France and Czechoslovakia and Poland and between Switzerland and Czechoslovakia and Yugoslavia.²⁰⁶ However, it is nowhere suggested that compensation should either be determined unilaterally or that it should take the form of vague and noncommittal promises to pay unspecified sums at uncertain dates.

On the question of payment of "prompt, adequate and effective" compensation in the nationalization of foreign property, there was a body of opinion at the 1952 Siena Session of the Institute of International Law to

¹⁹² Documents on International Affairs (Royal Institute of International Affairs), 1938, Vol. I, p. 472.

¹⁹³ Damages in International Law 1386 (1937).

¹⁹⁴ The International Responsibility of States for Denial of Justice 518 (1938).

¹⁹⁵ 54 Recueil des Cours de l'Académie de Droit International 429 (1935).

¹⁹⁶ Revue de Droit International Public, 1925, p. 22.

¹⁹⁷ 32 Revue Générale de Droit International Public 22 (1925).

¹⁹⁸ See, e.g., Mario Einaudi, Maurice Byé, Ernesto Rossi, Nationalization in France and Italy (Ithaca, 1955).

¹⁹⁹ See, e.g., A. R. Rado, "Czechoslovak Nationalization Decrees: Some International Aspects," 41 A.J.I.L. 795-806 (1947).

²⁰⁰ See, e.g., W. A. Robson, Problems of Nationalized Industry (London, 1952).

²⁰¹ See, e.g., Joyce Gutteridge, "Expropriation and Nationalization in Hungary, Bulgaria and Roumania," 1 Int. and Comp. L. Q. 14-28 (1952).

²⁰² British Treaty Series No. 10 (1949), Cmd. 7627.

²⁰³ *Ibid.*, No. 2 (1949), Cmd. 7600; see also U. S. agreement of 1948 with Yugoslavia, 62 Stat. 2658; Z. R. Rode, "The International Claims Commission of the United States," 47 A.J.I.L. 615 (1953); and Alfred Drucker, "Compensation for Nationalized Property: The British Practice," 49 A.J.I.L. 477 (1955).

²⁰⁴ British Treaty Series, No. 61 (1949), Cmd. 7798.

²⁰⁵ *Ibid.*, No. 34 (1951), Cmd. 8224.

²⁰⁶ See N. R. Doman, "Compensation for Nationalised Property in Post-War Europe," 3 Int. Law Q. 323-342 (1950).

the effect that a nationalizing state fulfills its obligations as to the payment of compensation by the payment of such compensation as is reasonable in the circumstances, taking into consideration the whole of its national economy.²⁰⁷

VI. SUMMARY OF CONCLUSIONS

1. It would seem that the contention that the concession agreements of the Suez Canal Company form an integral part of the Convention of October 29, 1888, because they were referred to both in the preamble and in the text of the treaty is not borne out by the *travaux préparatoires* respecting that treaty. This historic fact appears to have been overlooked so far by the states concerned in the present controversy.

2. It is at least arguable, based upon a reasonable interpretation of certain decisions of the Permanent Court of International Justice, that the Declaration made by the Ottoman Porte on December 1, 1873, established *per se* the objective international status of the Suez Canal Company, which would be a sufficient basis for the application of public international law. Consequently the company was no longer within the exclusive domestic jurisdiction of Egypt, and its nationalization was a violation of public international law. As far as is discernible, this thesis has not been widely raised.

3. There is no agreed definition in international law of the term "concession," or its character and legal status. Still less is there a clearly established right in international law on the part of a conceding state to nationalize or expropriate a concession as if it were merely a private contract. It is believed that a rule *sui generis*, based upon "the general principles of law recognized by civilized nations," and applying public international law, is the proper law to govern the legal obligations and continuing relationship of the parties, which transcend merely legal rights and legal obligations as they presently exist.

4. The proposal to establish an international body to control, operate and maintain the Suez Canal as an international waterway raises a political question, and, this article being primarily a legal analysis of limited aspects of the controversy, comment will be withheld.

²⁰⁷ See 44 *Annuaire de l'Institut de Droit International* (Session de Sienne, 1952, II) 251-323.

TITLE TO TERRITORY: RESPONSE TO A CHALLENGE

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The purpose of this paper is to test further a theory of international law, developed elsewhere in outline and primarily based on the evidence of the work of international judicial institutions and Anglo-American state practice.¹ The main thesis is that, on the level of unorganized international society, international law can be presented in terms of a system of interrelated legal rules from which seven fundamental principles of international law can be abstracted.²

On three grounds, the choice of title to territory as an appropriate and not unduly lenient test appears to suggest itself. First, on account of the dominating place of territorial sovereignty and jurisdiction in the fabric of international law, the significance of this topic does not require being labored. In spite of imposing superstructures of treaties which have transformed the international scene into a precariously organized world society,³ it is still as true as ever that territorial sovereignty is the "point of departure in settling most questions that concern international relations."⁴

Secondly, international courts and tribunals have made an even greater contribution than state practice to the elucidation of the operative rules, and a fairly complete analysis of the relevant judgments and awards is possible within the necessarily limited compass of a research paper.

Thirdly, the subject may even claim a certain topical character. Two recent judgments of the International Court of Justice constitute a challenge to the traditional doctrines in this field.⁵ As, in common with others, the present writer has succumbed in the past to the temptation of pressing the available judicial and diplomatic material into apparently ready-made molds of private law analogies,⁶ such strictures on traditional

¹ "The Fundamental Principles of International Law," 87 Hague Recueil 195 *et seq.* (1955).

² *Ibid.*, and below, p. 312.

³ See further the writer's *Power Politics* 261 *et seq.* (1951).

⁴ Judge Huber in the *Palmas Island Case* (1928) between The Netherlands and the United States of America, 2 United Nations Reports of International Arbitration Awards (hereafter cited as *Int. Arb. Awards*) 829 at 838; Scott, *Hague Court Reports* (2d Ser.) 83; 22 *A.J.I.L.* 867 (1928).

⁵ See below, p. 310.

⁶ *A Manual of International Law* 52 *et seq.* (3rd ed., 1952), and *International Law*, Vol. I (2nd ed., 1949). In the 3rd ed. of Vol. I (in the press) an attempt has been made to eliminate this shortcoming.

For further bibliographical references, see *op. cit.* (1949) 648-649, and *op. cit.* (1952) 234 *et seq.*

views as may be implied in the exposition which follows ought to be understood primarily as self-criticism for having accepted on trust any—more often than not—fallacious analogies from private law.

I. IN QUEST OF THE RULES ON TITLE TO TERRITORY

A clear understanding of the rules governing title to territory is made difficult by a number of factors which tend to becloud the actually operative rules.

In the formative stage of these rules, state practice and doctrine showed a natural tendency to express such issues in terms of analogies from private law, and, in particular, Roman law. Even during this phase, titles *jure belli* served a warning of the inherent differences between the laws of real property of highly integrated communities and the “analogous” field in the law of a loose and turbulent international society. Instead of being brushed aside as incongruous exceptions to an otherwise “perfect” analogy, they deserved to be considered as pointers to the autonomy of these issues on the international plane. Even so “obvious” a loan from Roman law as the use of *uti possidetis* in the Latin American practice since the early nineteenth century is more indicative of the differences between this remedy in Roman law and its application on the inter-state level than of any supposed likeness between these institutions.⁷

Although international judicial institutions have contributed much to the elucidation of this topic, it is in the nature of the judicial process that they should view such issues from a particular angle. In the typical case, they are confronted with conflicting claims of two contestants. Thus, they are not primarily concerned with the elaboration of the general rules governing title to territory and their operative scope in relation to third states, but with the relative superiority of the evidence produced by one of the parties. While this is an inevitable and general feature of judicial proceedings, judicial reluctance to formulate generally applicable rules is more pronounced in disputes of this kind than, for instance, in the fields of international responsibility or the laws of war and neutrality.

Moreover, the longevity of some of the subjects of international law brings with it the necessity of applying on a large scale rules of inter-temporal international law. Thus, different rules may have to be applied to the establishment, as distinct from the maintenance, of a title to territory. The complexity of the situation itself tends to obscure the rules which at present govern this field.

Finally, the complementary system of the Kellogg Pact and, first, the Covenant of the League of Nations and then the Charter of the United Nations, has affected the validity of territorial titles *jure belli*.⁸ On the surface, the outlawry of titles based on war other than war in self-defense and, according to some writers, even on the latter, has strengthened the case for analogies from private law and thus retarded the formulation of autonomous rules of international law in this field.

⁷ See below, p. 320.

⁸ See further *loc. cit.* note 1 above, p. 327 *et seq.*

A *dictum* in the *Anglo-Norwegian Fisheries Case* (1951) has encouraged recent writers to call for a re-examination of the whole presentation of this topic and to carry further its emancipation from outlived categories of private law analogies.⁹ In this *dictum*, the World Court had observed that the Norwegian system of fixing the baselines of Norway's territorial sea had acquired legal validity by way of "historical consolidation" and thus become "enforceable as against all States."¹⁰

What does "historical consolidation" mean? Especially in view of the qualifying adjective which accompanies the word *consolidation*, it would not be advisable to read into it any technical meaning which may be associated with it in any particular system of municipal law. In the context in which it is used, it suggests a perfection of title, which originally was lacking, in the course of time in relation to a growing number of states and, ultimately, even *erga omnes*. As, in the particular case before the World Court, the Court put the emphasis on the historical aspect of this process, an analysis of titles to territory in historical perspective may assist in tracing the governing rules.

II. THE PROBLEM IN HISTORICAL PERSPECTIVE

If early English state practice is typical of international law in the Middle Ages outside the Holy Roman Empire,¹¹ the starting point is pre-legal sovereignty and the normalcy of war in the absence of agreed states of truce and peace. In this primordial stage, effective control of a territory and power to defend it was the title deed which, of necessity, counted most. Soon additional title deeds of a more pronounced legal nature made their appearance: treaties of cession, marriage settlements and claims based on hereditary rights to succession, with the borderline between the public and private law features of such claims as blurred as might be expected during the transition from feudalism to territorial sovereignty. With the growth of a network of political and economic treaties, a fair number of titles to particular territories received express or implied recognition. Conversely, reservations regarding territorial claims and protests against pretensions of other sovereigns became routine devices of diplomatic practice.

From the Age of Discovery onwards, the problem had to be solved whether other states were prepared to accept the sweeping claims of first-comers in the field, even if fortified by Papal Bulls, to the newly discovered continents. Moreover, the aspirations of most of the sea Powers to exclusive control of large portions of the high seas had to be adjusted on a rational basis. Finally, after the Peace Treaties of Westphalia of 1648, the settlement of territorial questions in multilateral treaties became a permanent feature of the great peace settlements at the end of each major war.

⁹ Ch. de Visser, *Théories et Réalités en Droit International Public* 244-245 (1953), 251-252 (2nd ed., 1955); and Johnson, *Cambridge Law Journal* (1955), p. 215.

¹⁰ [1951] I.C.J. Rep. 116 at 138; 46 A.J.I.L. 348 at 366 (1952).

¹¹ See further 25 *British Year Book of International Law* 52 *et seq.* (1948), and 6 *Year Book of World Affairs* 251 *et seq.* (1952).

Seen in this historical perspective, the consolidation of territorial titles appears in its proper context of the evolution and expansion of international society. Then, three essential features of this phenomenon become apparent. First, consolidation of title is normally a gradual process. Secondly, in the beginning, every title is necessarily a relative title, and its holder aspires to transform it into an absolute title. Thirdly, the more absolute a title becomes, the more it rests on multiple foundations. Its constituent elements may be as varied as the devices which, at any time, international law makes available for the purpose of making such a title valid against third states.

In the relations between two states, the title deed may be a treaty of cession or marriage settlement. Other states may have given their consent to any particular territorial change by way of treaty and even strengthened such a title by their own guarantees. They may have recognized it in one way or another. They may have acquiesced in the transfer or not shown any interest in the matter. Some states may have considered it necessary to reserve their freedom of action or refused outright to recognize such a transfer. Thus, in this hypothetical and synthetic case which is an abstraction from the plenitude of material to be found in Rymer's *Foedera* and other collections of relevant documents, a treaty of cession is an important element, but only one of the constituent elements, of title. To perfect it, evidence of recognition, consent, or at least acquiescence on the part of third states is required.

The analysis of the problem in historical perspective puts the emphasis on consolidation of title as a process. Moreover, it underlines the two typical characteristics of titles to territory. It brings out their initial relativity and the growing multiplicity of their constituent elements in their movement towards absolute operation. Such an historical analysis also explains the unsatisfactory character of any attempt to put the operative rules into the strait jacket of private law analogies. Owing to the existence of a central authority in highly developed communities, absolute titles in such legal systems can be granted with immediate effect *erga omnes*. International society lacks such a central authority. Thus, analogies from municipal law tend to attribute an inherently absolute character to rights which, *prima facie*, are initially relative rights. Moreover, the law of real property has its sometimes openly acknowledged, sometimes hidden, public law aspects.

International customary law is an individualistic type of law and, *inter partes*, may be modified as its subjects see fit. As in the case of *uti possidetis*, some states may decide to treat original forms of acquisition of territory as derivative and bind themselves to refrain from employing certain modes of acquiring territory. While in the relations between two states a transfer of territory may be clearly derivative, from the point of view of third states the distinction between original and derivative titles to territory may be completely irrelevant. In order to prove the validity of any title in relation to them, other constituent elements of such a title may be much more relevant: consent, recognition or acquiescence. As the

scope and timing of such acts depend on the free will of third states, their simultaneity cannot be presumed.

Overestimation of the significance of private law analogies tends to obscure the relativity of the value of the distinction between original and derivative titles in international law, the basic relativity of any title, the multiplicity of its constituent elements, and the character of consolidation as an essentially historical process. It is not, therefore, surprising that, by reliance on analogies from private law, it should be hard to find the operative rules.

Review of this issue in historical perspective provides the clue to the direction in which a more fruitful search may proceed. By way of a working hypothesis, it may be assumed that the operative rules are not particular rules, but the rules governing the relevant fundamental principles of international law. At the same time the possibility remains open that in their application to the specific problem of territorial titles the interaction of these rules may have produced more concrete rules of a secondary character. Thus, we shall explore whether, without undue artificiality, the practice of international judicial institutions is intelligible in terms of an application of these primary rules of international law to territorial questions. Pending further verification of their usefulness, accepted terms such as occupation, accession or cession will be used merely to illustrate the factual situations which are typically associated with such primarily doctrinal molds.

III. THE RULES GOVERNING TITLE TO TERRITORY

The seven fundamental principles of international law are those of sovereignty, recognition, consent, good faith, self-defense, international responsibility and the freedom of the seas. The question to be answered in this section is whether and how far the rules underlying any of these principles can claim to be the rules governing titles to territory.

A. SOVEREIGNTY

The actual exercise of territorial jurisdiction tends to create a presumption in favor of the right to exercise such jurisdiction. If such a *de facto* exercise of jurisdiction is continuous and, in relation to other states, peaceful, that is to say, not contested, such a position is "as good as a title."¹² In any case, it is superior to any inchoate title such as one by discovery or claims based on mere contiguity of territories.¹³ *De facto* exercise of jurisdiction also prevails over a naked title of sovereignty if such an abstract title remains unimplemented by any actual display of state authority.¹⁴

(1) *Addition of Land by Natural Causes.* Owing to natural events, land may be added to the seashore, river deltas formed or the bank of a river increased or diminished. This may happen gradually or suddenly.

¹² *Palmas Island Case* (1928), 2 Int. Arb. Awards 829 at 839.

¹³ *Ibid.* 855.

¹⁴ *Ibid.* 846.

Liberal use of the elaborate terminology of Roman law—accretion, avulsion and avulsion—in the doctrine of international law has obscured the fact that these terms have no technical meaning and are not necessarily accurate abstractions from the governing rules. This is not to deny that certain similarities between these situations exist. They lie, however, in the identity of the underlying natural phenomena, and not in the operative rules.

In the case of the addition of land to the seashore, the maritime frontiers move automatically outwards because the baseline of the territorial sea is determined by reference to the low-water mark. Moreover, the coastal state is the only state which can accomplish its “effective apprehension.”¹⁵ The same applies to river deltas and new islands in the maritime belt of a coastal state.

In relation to boundary rivers, judicial authority on the international, as distinct from the federal, level is scanty. In state practice, however, the rule is widely accepted that, in the absence of any treaty arrangement to the contrary, the middle of the river forms the international boundary. On the basis of a considerable treaty practice which corresponds to common sense, the middle of a navigable river is not determined mechanically, but functionally, that is to say, is constituted by the center of the main channel of the river or the *thalweg*.

If additions to one river bank occur, the state which controls the river bank automatically assumes control over the new land. The presumption which results from such effective control operates in favor of the contiguous state. In the *Palmas Island* case (1928) Judge Huber has clearly stated the *ratio* of this rule. The new land accrues to a “portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity.”¹⁶

If a river abandons its old bed altogether, the international frontier remains unchanged. It remains in the middle of the deserted river bed. The *ratio* of this rule is that, once the land formerly occupied by the river is exposed, each of the states which formerly was able to exercise some jurisdiction over the river bed and the water above it is now in a much stronger position to exercise such jurisdiction. Moreover, as distinct from the case of gradual accretion of land to one of the river banks, the *status quo ante* can be easily ascertained. In the *Chamizal Arbitration* (1911) both Mexico and the United States accepted these rules as conforming to existing international law.¹⁷ The award itself, however, turned on the interpretation of the treaties concluded between the two countries regarding the Rio Grande and the Rio Colorado. Moreover, the United States refused to accept the award. Thus, the admissions made by the parties are probably the only feature of this case which is of general significance.

The title to newly created land rests primarily on the unilateral assumption of jurisdiction in situations in which, for all practical purposes, the territorial sovereign has a monopoly of such changes. In cases other

¹⁵ *Ibid.* 839.

¹⁶ *Ibid.*

¹⁷ 5 A.J.I.L. 785 at 793-794 (1911).

than the complete abandonment by a river of its former bed, difficulties of establishing evidence to the contrary and following up claims *in abstracto* by effective occupation on the part of any other state tend to lead to acquiescence. Circumstances of this kind have permitted the formation of a rule to the effect that the accretion of land in the situations described above leads to its incorporation into the adjacent existing territory.

(2) *Acquisition of Unclaimed or Abandoned Territory.* It follows from the exclusiveness of international law that rights and duties under international law exist only between subjects of international law. Thus, if territories are inhabited by communities which lack international personality and are not claimed by any other subject of international law, or are abandoned by a former sovereign, the unilateral assumption of jurisdiction over such territories by a subject of international law is an effective root of territorial title.¹⁸

Whether such communities outside the pale of international law submit peacefully or otherwise is irrelevant. As the World Court held in the *Eastern Greenland* case (1933) between Denmark and Norway, it would be inappropriate to describe the forcible subjugation of such territories as conquest, for

conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty passes from the loser to the victorious State.¹⁹

In this passage state stands for a subject of international law. Moreover, on the level of organized international society, this *dictum* only applies subject to serious qualification.²⁰ It confirms, however, that in the first place title to territory acquired in whatever manner from objects of international law rests on unilateral assumption of territorial jurisdiction.

If a subject of international law abandons its exercise of territorial jurisdiction over a territory, any other subject of international law is free to establish there its own jurisdiction. This was the *ratio decidendi* of the *Clipperton Island* case (1931) between France and Mexico.²¹ At the time when France occupied the island, it was *territorium nullius*, for no other subject of international law had exercised effective territorial jurisdiction there before, or at the time of, the occupation. Thus, irrespective of additional constitutive elements which may be required to perfect a title based on occupation,²² the basic root of such a title is unilateral and effective assumption of jurisdiction.

(3) *Debello.* If, as the result of legal, as distinct from illegal, war,²³ the international personality of one of the belligerents is totally destroyed, victorious Powers may do one of three things. They may annex the territory of the defeated state or hand over portions of it to other states. They may leave it untouched as *territorium nullius* to be occupied by any other subject of international law. Finally, they may create and recognize one

¹⁸ *Eastern Greenland* case (1933), P.C.I.J., Ser. A/B, No. 53, p. 50.

¹⁹ *Ibid.* 47.

²⁰ See further *loc. cit.* note 8 above.

²¹ 2 Int. Arb. Awards 1105 at 1110; 26 A.J.I.L. 390 (1932).

²² See below, p. 321.

²³ See further *loc. cit.* note 8 above.

or several new subjects of international law in the area or, *inter se* and in relation to any other subject of international law which is prepared to accept such an assertion, one or several of such new entities as successors to the defunct entity.

During the interim state of the occupation of Germany in the wake of the second World War, the Occupying Powers chose to treat Germany as an international entity of its own. By way of unilateral assumption of jurisdiction they established a *co-imperium*, exercised both jointly and severally in the respective zones of occupation. In the relations between the Western Powers and the Soviet Union, this *co-imperium* still continues with regard to Germany as a whole and Berlin. For all other purposes, the Western Powers have recognized the Federal Republic as the successor to the Third Reich. Similarly, the Soviet Union and her allies have recognized Eastern Germany as an independent state, and, in 1956, the Soviet Union also recognized the Federal Republic of Germany.

The Nuremberg International Military Tribunal (1946) relied heavily on the *co-imperium* of the Occupying Powers over Germany as one of the foundations of its own jurisdiction. After the unilateral assumption of "supreme authority" in Germany,²⁴ the Occupying Powers were not confined to the exercise of their rights under international law in relation to war criminals. The London Protocol of 1945, in which the Occupying Powers determined the Tribunal's powers, constituted an

exercise of the sovereign legislative power by the countries to which the German *Reich* unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world . . .

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.²⁵

Thus, irrespective of whether the Tribunal's Charter was in accordance with international customary law as it then stood,²⁶ the law administered by the International Military Tribunal constituted overriding German municipal law, laid down by the Occupying Powers in the exercise of their *co-imperium* over Germany.

(4) *The Meaning of Effective Control.* In each of the cases discussed above, the essential element is effective control of the territory in question. It is an element of title which is of central importance for purposes of both the acquisition and maintenance of title.

What amounts to effective occupation varies from place to place. In cases of islets and rocks, or jungle country, limits are set to physical appropriation.²⁷ In that of a relinquished and uninhabited island, as Clipperton Island, an initial display of sovereignty may suffice even to main-

²⁴ Cmd. 6648 (1945), pp. 2 and 7; 39 A.J.I.L. Supp. 171 (1945).

²⁵ Cmd. 6964 (1946), p. 38; 41 A.J.I.L. 172 at 216 (1947).

²⁶ See further *op. cit.* in note 6 above (1951), p. 308 *et seq.*

²⁷ *Minquiers and Ecrehos case*, [1953] I.C.J. Rep. 53; 48 A.J.I.L. 316 (1954).

tain the title unless evidence of any subsequently expressed intention to abandon such jurisdiction is forthcoming.²⁸ Normally, however, effective possession manifests itself by the establishment of proper state machinery for purposes of defense and administration of the occupied territory and the actual display of state jurisdiction. In the *Eastern Greenland* (1933) and *Minquiers and Ecrehos* (1953) cases, the World Court discussed typical forms of such exercise of state jurisdiction.²⁹

As long as the fact of exercise of state jurisdiction and the intention to exercise such jurisdiction exist, the complete establishment of territorial sovereignty may be a prolonged process of a "progressive intensification of State control."³⁰ It is neither feasible nor necessary that such jurisdiction should be exercised at every moment in every part of the territory in question. As Judge Huber put it in the *Palmas Island* case (1928):

The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas.³¹

Similarly, in the *Minquiers and Ecrehos* case (1953), Judge Basdevant emphasized in his separate opinion that to exercise effective military control did not necessarily mean garrisoning practically uninhabited or uninhabitable places, but that, for this purpose, power to hold such areas at will and to prevent other states from occupying them was sufficient.³² Furthermore, it depends entirely on local needs to what extent state jurisdiction and control need be exercised in smaller and less important isles in a group of islands, whether or not they constitute an archipelago.³³

Acts of individuals by themselves are no substitute for the display of state authority. Unless authorized in advance or subsequently ratified, the activities of individuals can be neither attributed nor imputed to the state whose nationals they are.³⁴

B. RECOGNITION

The pliability of recognition as a general device of international law makes recognition an eminently suitable means for the purpose of establishing the validity of a territorial title in relation to other states.³⁵ However weak a title may be, and irrespective of any other criterion, recog-

²⁸ 2 Int. Arb. Awards 1107 at 1110.

²⁹ P.C.I.J., Ser. A/B, No. 53, pp. 45-48 and 62; and [1953] I.C.J. Rep. 65-67.

³⁰ *Palmas Island* Award, 2 Int. Arb. Awards 829 at 867.

³¹ *Ibid.* 840. Cf. also *ibid.* 855, and P.C.I.J., Ser. A/B, No. 53, pp. 45-46.

³² [1953] I.C.J. Rep. 78.

³³ *Ibid.* 53, 78 and 98-99.

³⁴ Judge Hsu Mo's separate opinion in the *Fisheries* case, [1951] I.C.J. Rep. 157; Judge McNair's dissenting opinion, *ibid.* 184. See, however, Judge Levi Carneiro's individual opinion in the *Minquiers and Ecrehos* case, [1953] *ibid.* 104-105.

³⁵ See further *loc. cit.* note 1 above, p. 228 *et seq.*, and *op. cit.* note 6 above (1949), p. 62.

dition estops the state which has recognized the title from contesting its validity at any future time.

In the *Palmas Island* case (1928) Judge Huber incorporated recognition in his definition of territorial sovereignty as

in general, a situation recognized and delimited in space, either by so-called natural frontiers as recognized by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbors, such as frontier conventions, or by acts of recognition of states within fixed boundaries.³⁶

In the case of the *Jaworzina Boundary* (1923), the World Court treated recognition as one of the constituent elements of territorial title:

When, as a result of the European War and the dissolution of the Austro-Hungarian Monarchy, Poland and Czechoslovakia were re-established as independent States, their frontiers were, generally speaking, indicated by the same historical and ethnological factors which had led to their reconstitution. The necessity remained, however, either for a formal pronouncement with regard to the extent of the territories respectively allocated to the two States above-mentioned or for a settlement of territorial questions in regions where, owing to special circumstances, the historical or ethnological frontier remained uncertain or met with difficulties which prevented the parties concerned from voluntarily accepting it.³⁷

Again, in the *Eastern Greenland* case (1933) the World Court drew on this root of title:

A second series of undertakings by Norway, recognising Danish sovereignty over Greenland, is afforded by various bilateral agreements to which both Denmark and Norway were Contracting Parties, in which Greenland has been described as a Danish colony or as forming part of Denmark or in which Denmark has been allowed to exclude Greenland from the operation of the agreement.³⁸

The significance of these *dicta* consists in the fact that international judicial institutions do not work on the assumption of any one element of title producing an absolute effect *erga omnes*.

Recognition creates an estoppel in the relations between the state making such a unilateral declaration and its addressee. Subject to one reservation, recognition of the territorial claims of another state cannot affect adversely the legal position of the effective occupant.³⁹ The proviso which must be made is that such a recognition of the claims of another state deprives the state which is in actual control of the territory of the chance of obtaining recognition of its own rights.

The impact of recognition on territorial titles does not exhaust itself in proving the relativity of such titles and offering a means of making such titles absolute. Persistent refusal on the part of the preponderant

³⁶ 2 Int. Arb. Awards 829 at 838.

³⁷ P.C.I.J., Ser. B, No. 8, p. 20. See also above, p. 314.

³⁸ P.C.I.J., Ser. A/B, No. 53, p. 68.

³⁹ 2 Int. Arb. Awards 829 at 846 *et seq.* See also *ibid.* 868.

majority of states to recognize territorial claims in forms which, in principle, are unacceptable to other states, has contributed decisively to the shaping of the actually operative rules and the evolution of inter-temporal law in this field to its present state.

Thus, a gradually growing disinclination on the part of states to recognize claims to title based on discovery alone, and not completed by effective occupation, has reduced discovery to an inchoate title.⁴⁰ In the case of titles founded on mere contiguity, the same process has repeated itself. Even if a claim resting on contiguity is combined with an appeal to "natural" frontiers, preference is given to "even isolated acts of display of sovereignty."⁴¹ In present-day international law, "title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law."⁴² In both cases, the lack of precision of any such claim militates against its recognition as a root of territorial title.⁴³

Thus it emerges that the device of recognition can be employed as an independent root of title. Moreover, the discretionary power of states to grant or refuse recognition of territorial claims has decisively shaped the operative rules on the prerequisites of title. The widespread use of non-recognition for the purpose of denying claims based on mere discovery or contiguity has displaced these criteria as constitutive elements of title to territory, and greatly assisted the element of effective control to acquire its prominent place among the roots of title.

C. THE PRINCIPLE OF CONSENT

Consent under this heading will be understood in its most comprehensive sense.⁴⁴ It includes not only consent expressed in formal treaties and explicit informal undertakings such as the Ihlen Declaration,⁴⁵ but also any form of silent consent such as acquiescence or toleration.

A treaty of cession is the most unequivocal way in which a state may express its relinquishment of all territorial claims to a territory.⁴⁶

In the course of the evolution of international law, conquest as such has been reduced in cases other than *debellatio*⁴⁷ from a constitutive element of title to an inchoate title.⁴⁸ In present-day international law, it is by itself not sufficient to transform wartime occupation into a transfer of sovereignty.⁴⁹ Even in the relations between belligerents, not to speak of third states, the title requires to be consolidated by positive acts of

⁴⁰ *Ibid.* 27.

⁴¹ Alp Craivarella Arbitration (1874) between Italy and Switzerland, La Fontaine, Pasieris International, p. 201, and Moore, 2 International Arbitrations 2027, as interpreted in the Palmas Island Case (1928), 2 Int. Arb. Awards 829 at 855.

⁴² *Ibid.* at 869.

⁴³ *Ibid.* 854.

⁴⁴ See further *loc. cit.* note 1 above, p. 262 *et seq.*

⁴⁵ See further *op. cit.* note 6 above (1949), pp. 67-68.

⁴⁶ Case of German Reparations under Article 260 of the Peace Treaty of Versailles (1924), 1 Int. Arb. Awards 429 at 443.

⁴⁷ See above, p. 314.

⁴⁸ Cf. Judge Basdevant's individual opinion in the Minquiers and Ecrehos case, [1953] I.C.J. Rep. 76-77.

⁴⁹ Ottoman Debt Arbitration (1925), 1 Int. Arb. Awards 529 at 555.

recognition or consent or, at least, by acquiescence of the former territorial sovereign.

Moreover, states are free to undertake obligations by way of treaty not to attempt to attain or recognize the transfer of territory by threat or use of force. It depends on the interpretation of such treaties as the Kellogg Pact, Article 10 of the Covenant of the League of Nations or Paragraph 4 of Article 2 of the United Nations Charter whether, in this way, the parties meant to establish an international quasi-order or *jus cogens* which would deprive them of their capacity to make treaties *inter se* in contravention of the rules laid down in these treaties.⁵⁰ However this may be, parties to these treaties are bound at least not to recognize titles to territory obtained in contravention of such treaty obligations and thus put the seal of their own approval on breaches of these obligations. At this point, the rules underlying the principles of consent and recognition interact on one another. By consent states have limited their discretion to assist in giving an absolute operation to certain, at the most, relative titles.

Within the limits of such an international quasi-order, sovereign states are free to transfer any of their own territories to one another. International law prescribes no particular form in which a cession of territory must take place. All that matters is that the cession takes place with the full "consent of the Governments concerned."⁵¹ Unless anything to the contrary is expressly agreed, a cession becomes effective only with the actual transfer of sovereignty. The World Court emphasized this point in its Judgments on *Certain German Interests in Polish Upper Silesia* (1926) and on the *Lighthouses in Crete and Samos* (1937). Until the date of the "entire disappearance of any political link" with the ceding state, the sovereignty over the ceded territory remains with the ceding state. In exceptional circumstances, as when the transfer depends on a plebiscite, this date may be subsequent to that of the cession treaty coming into force.⁵²

As the Permanent Court of Arbitration held in the *Grisbadarna* case (1909) between Norway and Sweden, the cession of territory automatically includes the appurtenances of territory. Thus, for example, in the case of the cession of land territory, it would include the accessory maritime territory.⁵³

A cession may be made dependent on the fulfillment of a suspensive condition. In the case of a cession subject to a plebiscite confirming the cession, it may even happen that the frontiers of the ceded territory can be determined only subsequent to the plebiscite. The same applies to treaties which entrust the determination of certain frontiers to an international commission or to the decision of a third party. In such cases, as affirmed by the World Court in the *Mosul* case (1925), the cession is not ineffective owing to any indefiniteness in the agreement:

⁵⁰ See further *loc. cit.* note 1 above, p. 376 *et seq.*

⁵¹ P.C.I.J., Ser. B, No. 8, p. 53.

⁵² P.C.I.J., Ser. A, No. 7, p. 30; Ser. B, No. 6, p. 28; Ser. A/B, No. 71, p. 103. Cf. also Ser. A/B, No. 62, p. 24.

⁵³ 1 Scott, Hague Court Reports 121 at 124.

renunciation of rights and title is suspended until the frontier has been determined, but it will become effective, in the absence of some other solution, in virtue of the binding decision.⁵⁴

The rules underlying the principle of consent may also be put to other uses as, for instance, to modify or exclude otherwise relevant roots of title. Thus, in the *Minquiers and Ecrehos* case (1953), the World Court interpreted the *compromis* between France and the United Kingdom so as to exclude from consideration the possibilities of either of the parties having acquired jurisdiction over these islands as *territorium nullius* or these islands being under the *condominium* of both parties.⁵⁵ In these circumstances, the issue was reduced to a question of preponderance of evidence which related "directly to the possession of the Ecrehos and Minquiers groups."⁵⁶ On this basis, all that remained to be done was to "appraise the relative strength of the opposing claims to sovereignty" over these islands.⁵⁷

An illustration of the use of consent for purposes of excluding reliance on acquisition of *territorium nullius* or titles *jure belli* is the practice embodied in a number of bilateral treaties and constitutions of Latin American countries and known as the rule of *uti possidetis*. This term is not meant to suggest reliance on the *Interdictum uti possidetis* in Roman law, but to express the intention of those Latin American countries which had formed part of the Spanish Colonial Empire that, whenever possible, their international frontiers should follow the former administrative colonial frontiers. Thus even territories which in fact had never been occupied either by Spain or any of the Latin American Republics were "by common consent considered occupied in law from the first hour" by these newly created states.

In the Award in the *Colombia-Venezuela Boundary Arbitration* (1922), the Swiss Federal Council pointed out that in this way, "encroachments and unseemly attempts at colonisation from across the frontier as well as occupations in fact became without importance and without consequence in law." Moreover, the rule of *uti possidetis* was not only meant to exclude any form of original title in the relations between Latin American states, but was also intended to exclude recognition of territorial titles which non-American states might desire to acquire on the American Continent.⁵⁸ In this respect, the rule of *uti possidetis* anticipated the Monroe Doctrine in Central America by more than a decade and in South America by two years.

In the *Guatemala-Honduras Boundary Arbitration* (1933), the Special Boundary Tribunal emphasized the uncertainties of the rule of *uti possidetis*. It left open the issue whether possession in 1821 meant *de facto* or *de jure* possession. The Tribunal resolved this question by reference to the test whether one or the other of the colonial units, which subse-

⁵⁴ P.C.I.J., Ser. B, No. 12, p. 22.

⁵⁵ [1953] I.C.J. Rep. 52; 48 A.J.I.L. 316 (1954).

⁵⁶ [1953] I.C.J. Rep. 57.

⁵⁷ *Ibid.* 67.

⁵⁸ 1 Int. Arb. Awards 223 at 228.

quently became independent states, had exercised administrative control in the area in dispute "pursuant to the will of the Spanish Crown." Even so, the Tribunal found it difficult to determine the actual frontier line, for at the crucial date of 1821 much of this region had remained unexplored and, in fact, the Spanish Colonial Administration had never fully determined these frontiers nor established in large parts of this border zone even a "semblance of administrative authority."⁵⁹

By consent, states may also impose on one another duties which surpass those of international customary law and with which parties to such treaties have to comply in order to acquire an internationally valid title to territory. Thus, under Article 34 of the Act of Berlin of 1885, signatories undertook to notify one another of acts of taking possession of territories on the coasts of Africa in order to enable other parties to make good any claims of their own. As was emphasized in the *Clipperton Island* case (1931), this additional duty was entirely a creation of treaty law and "presupposed an occupation which had already taken place and was already valid" under international customary law.⁶⁰ Between the signatories of the Convention of St. Germain of September 10, 1919, which does not contain any corresponding provisions, the Act of Berlin of 1885 has been abrogated and the position under international customary law restored.

Whether silence should be interpreted as tacit consent depends entirely on the circumstances of the individual case. Notification of an occupation or treaty of cession to a third state serves the purpose of an invitation to recognize or to challenge the claim of the notifying Power. With the passing of time, silence tends to be interpreted as acquiescence or tolerance. If, without opposition, jurisdiction has been exercised over a prolonged period, the title has acquired absolute validity. The explanation lies in the interplay of the rules underlying the principles of consent and good faith.⁶¹ Such a state of affairs may have existed so long that it can be described as immemorial possession. In the *Meerhaage Arbitration* (1902) between Austria and Hungary, this has been defined as possession which has

lasted for so long a time that it is impossible to furnish the proof of a different situation and which no person can remember having heard spoken of. Besides, such possession should be uninterrupted and uncontested. It goes without saying that such possession should also have lasted up to the moment when the dispute and the conclusion of a *compromis* took place.⁶²

Acquiescence does not, however, require compliance with so stringent a test. Since the *Palmas Island* (1928) and *Eastern Greenland* (1933) cases, it may be taken as good law that it suffices if, in relation to third states, the exercise of jurisdiction is peaceful.⁶³

In the *Palmas Island* case, Judge Huber explained the special meaning of

⁵⁹ 2 *ibid.* 1307 at 1322-1325.

⁶⁰ *Ibid.* 1105 at 1110.

⁶¹ See above, p. 318 *et seq.*

⁶² 38 *Rev. de Droit Int. et de Lég. Comp.* 196 at 207 (1906).

⁶³ 2 *Int. Arb. Awards* 829 at 839; and *P.C.I.J.*, Ser. A/B, No. 53, p. 50.

this term. Before any dispute on the validity of any particular title has arisen, the state in actual possession must have displayed its jurisdiction

long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.⁶⁴

Sometimes, the same idea is also expressed in the form that the exercise of territorial jurisdiction must be open and public. If it is effective, and not merely fictitious, a "clandestine exercise of State sovereignty over an inhabited territory during a considerable length of time would seem to be impossible."⁶⁵

If the conditions of effective, continuous and peaceful exercise of territorial jurisdiction are fulfilled, a relative title grows into an absolute title which is valid *erga omnes*.⁶⁶ Acquisition of title in this manner may be called title by way of acquisitive prescription. It shares with extinctive prescription the legal effect of creating an estoppel against third states whose claims have become stale.⁶⁷

The composite nature of any title based on acquisitive prescription becomes evident from the fact that it rests on the interplay of rules underlying the principles of sovereignty, consent and good faith. Like any form of prescription, it derives its justification from the difficulties, which grow with the passing of time, of furnishing evidence of matters lying far back,⁶⁸ from the tendency not to change a "state of things which actually exists and has existed for a long time"⁶⁹ and the strength of the primary constituent element of title, that is to say, exercise of effective jurisdiction as compared even with rights of sovereignty in the abstract.⁷⁰

Before the international quasi-order of the Kellogg Pact and the League of Nations and, subsequently, the United Nations came into operation, it was possible to argue that mere paper protests were not sufficient to maintain indefinitely the right of a state to any of its territories effectively occupied by another state. However this may have been, even then protests and reservations precluded the presumption of consent. Under this complementary quasi-order, states have not only renounced the threat or use of force in cases other than self-defense, but have also undertaken the positive obligation to "settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered."⁷¹ In these circumstances, much is to be said for

⁶⁴ 2 Int. Arb. Awards 829 at 867, 868 and 870.

⁶⁵ *Ibid.* at 868. Cf. also the Clipperton Island case (1931), *ibid.* 1105 at 1108 and 1110.

⁶⁶ *Ibid.* at 840.

⁶⁷ See further *loc. cit.* note 1 above, p. 256 *et seq.*

⁶⁸ 2 Int. Arb. Awards 829 at 840.

⁶⁹ Grisbadarna case (1909) between Norway and Sweden, 1 Scott, Hague Court Reports 121 at 130.

⁷⁰ 2 Int. Arb. Awards 829 at 856; and P.C.I.J., Ser. A/B, No. 53, p. 45. See also above, p. 312.

⁷¹ Par. 3 of Art. 2 of the United Nations Charter. On the interrelationship between Pars. 3 and 4 of Art. 2 of the Charter, cf. *loc. cit.* note 1 above, p. 354.

the view that, in order to maintain a claim to territory, a mere reservation of rights or protests do not suffice for an indefinite period. The state concerned must supplement such action by evidence of having made every effort to induce the state in possession to agree to the peaceful settlement of the dispute by one of the ways enumerated in Article 33 of the Charter of the United Nations.

In one case, however, it is clear that silence does not amount to acquiescence. If third states purport to dispose by treaty of a territory which is under the effective jurisdiction of another state, notification of such a treaty to the territorial sovereign does not create any obligation to react to such a challenge.⁷² At the most, such a treaty signifies that, in relation to the contracting parties, the title of the effective occupant remains a relative title.

This position may be expressed in the terms that a state cannot transfer more rights than it itself possesses,⁷³ but only subject to some qualifications. Even if a state transfers only such rights as it possesses, this by itself is not sufficient to convey an absolute title. Moreover, if the territorial sovereign acquiesces in the purported transfer by relinquishment of its own jurisdiction, third states can in effect transfer rights which they themselves do not possess. Thus, the maxim "*Nemo dat quod non habet*" sums up somewhat tersely the legal result which is achieved by the interplay of rules underlying the principles of sovereignty, consent and recognition.

D. RULES UNDERLYING THE OTHER FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW

In connection with the discussion of the rules on recognition and consent, the rôle of the rules governing good faith in relation to territorial titles has already been sufficiently emphasized.⁷⁴ Their uniform function is to create estoppels which prevent states from contesting titles which they have recognized or in which they have acquiesced.

The rules underlying the principle of self-defense, coupled with those governing consent, provide the test by which may be judged the validity of titles *jure belli*.⁷⁵

The rules on international responsibility have influenced those on territorial titles in a more subtle way. Even if states are not themselves directly interested in any particular territory, they are concerned with having an identifiable addressee of international claims under treaties and international customary law. In order to obtain redress for their nationals, they can appeal effectively only to the state which exercises real control over the territory in question. Thus, this typical interest of other states tends to act as an incentive to a state which claims a territory as its own to exercise effective control over it. Conversely, the effective exercise of territorial jurisdiction acts as an inducement to other states to

⁷² 2 Int. Arb. Awards 829 at 843. See also *ibid.* 869.

⁷³ *Ibid.* 842. Cf. also Judge Levi Carneiro's dissenting opinion in the *Minquiers and Ecrehos Case*, [1953] I.C.J. Rep. 103.

⁷⁴ See above, pp. 316 and 318.

⁷⁵ See above, p. 309.

treat as the sovereign the state which exercises such jurisdiction rather than any state which is unable to protect their interests.

In short, in a system of co-existing sovereign states, the rules underlying the principle of international responsibility tend to work in favor of territorial titles based on effective occupation. In the *Palmas Island* case (1928), Judge Huber referred to this nexus when, in one place, he defined effective occupation as one which "offers certain guarantees to other States and their nationals."⁷⁶

Finally, the rules governing the principle of the freedom of the seas are relevant, at least by way of contrast. The refusal to recognize quasi-territorial claims to the high seas has been the decisive formative agency in shaping the rule that the high seas are *res extra commercium*. While, in the initial phase of this rule, it was supported by an apparent inability of maritime Powers to make good by effective control their extravagant claims to sovereignty over portions of the high seas, this *raison d'être* of the rule gradually lost its significance. Although impaired by acquiescence in inflated claims to the continental shelf and territorial seas,⁷⁷ the rule still rests ultimately on the firm refusal of states to recognize encroachments on this fundamental rule.

Thus, it appears that the practice of international courts and tribunals fits easily into a pattern which dispenses completely with analogies from private law. It then emerges that titles to territory are governed primarily by the rules underlying the principles of sovereignty, recognition, consent and good faith. By the interplay of these rules, relative titles may be transformed into absolute titles. The more absolute a title becomes, the more apparent becomes the multiplicity of its roots. In the typical case it is the result of a gradual process in time which the World Court has aptly described as historical consolidation of title.

⁷⁶ 2 Int. Arb. Awards 829 at 846. See also above, p. 315.

⁷⁷ See further *loc. cit.* note 1 above, p. 358 *et seq.*

THE SOVIET UNION AND THE PROBLEM OF REFUGEES AND DISPLACED PERSONS 1917-1956 *

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The Soviet Union, since its inception in 1917, has been the world's largest source of refugees and displaced persons. This in itself would be sufficient motive to examine the Soviet attitude towards this category of individuals, but apart from mere quantity, the question is of interest, too, for other reasons: Russian refugees¹ were the cause and the first subjects of international legal attempts to solve the problem; Soviet policies toward them have been unusual at all times, resulting in some bold innovations in international law; and most refugees and displaced persons at present come from behind the Iron Curtain,² thereby involving the Soviet Union and its satellites, whose policies are influenced by and modeled on the Soviet experience.

I. ATTITUDE OF THE SOVIET UNION TOWARDS FORMER RUSSIAN CITIZENS ABROAD, 1917-1939

Writing in 1951 on the question of post-World War I refugees, a leading Soviet jurist, O. E. Polents, affirmed:

The problem of refugees and displaced persons substantially boils down to a guarantee of the earliest return of these persons to their country.³

Yet, as we shall see, at the time of the problem speedy repatriation was not the principal solution in the Soviet Union's policy toward Russian citizens in exile.

"The largest post-war group of political refugees was that of the Russians, who poured into adjacent states after the Revolution and the

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As far as possible the documentation was done from Soviet materials and the translations from Russian have been made to follow the original as closely as possible.

¹ For the sake of this study the definition of "Russian refugee" used is the one adopted by the League of Nations, May, 1926: "Any person of Russian origin who does not enjoy or no longer enjoys the protection of the Government of the USSR and who has not acquired another nationality."

² The recent flight of more than 150,000 persons from Hungary in the wake of the revolt, which certainly is at this time the most actual and tragic problem of refugees from Soviet oppression, has served to fix the spotlight on a process which, though never previously attaining the floodlike dimensions of the last few months, has been continuous since 1945 and has involved many thousands.

³ Akademiya Nauk SSSR, Institut Prava (Academy of Sciences of the U.S.S.R., Institute of Law), *Mezhdunarodnoe Pravo* (International Law) 245 (Moscow, 1951).

Civil War."⁴ At the end of World War I and up to 1921, between one and two million souls left Russia.⁵ "The political and economic repercussions of the World War, which intensified the refugee problem so enormously, universally affected the countries which had to meet the problem,"⁶ which became too vast to be taken care of intelligently through piecemeal measures. The question had become one for the international community as a whole; therefore

League intervention was first requested by various international relief organizations in 1921, on behalf of the million or more emigrés who fled from Russia at the time of the Soviet Revolution. The request, addressed to the Council, asked for help to deal with the juridical and material conditions of the refugees.⁷

With the nomination on August 20, 1920, of Dr. Nansen as "High Commissioner on behalf of the League in connection with the problem concerning Russian refugees in Europe," new solutions were sought to supplement the right of asylum, which "has been the basis for the immediate relief of vast numbers of refugees, even though they cannot claim it as a right."⁸

The main causes of the refugee movement from Russia in the years 1918-1922⁹ were the Bolshevik Revolution of November, 1917, the collapse of the

⁴ L. W. Holborn, "The Legal Status of Political Refugees, 1920-1938," 32 A.J.I.L. 681 (1938).

⁵ By the very nature of the problem, statistics are not very reliable and estimates vary considerably. J. H. Simpson, *The Refugee Problem, Report of a Survey* 62 (London, 1939), estimates the number at about one million; H. von Rimscha, *Der Russische Bürgerkrieg und die Russische Emigration* 50-51 (Jena, 1924), puts the number at close to 3 million; Dr. Nansen, *Report on the Work of the High Commission for Refugees, September 4th, 1923* (League of Nations Doc. A.30.1923.XII), quotes 1½ million, as also do E. M. Kulischer, *The Displacement of Population in Europe* (International Labour Office, Studies and Reports, Series O, No. 8, Montreal, 1943), p. 39; D. Thompson, *Refugees, Anarchy or Organization?* 15 (New York, 1938); and N. Bentwich, "The International Problem of Refugees," *Geneva Special Studies*, Vol. VI, No. 5, p. 17 (1935). Soviet and émigré authors put the number at 2 million. See P. T. Jurid and N. A. Kovalevsky, *Ekonomicheskaya Geografiya S.S.S.R.* (Economic Geography of the U.S.S.R.) (Moscow, 1934), Vol. I, pp. 73, 78; and V. K. Davatts, *Russkaya Armiya na Chuzhbine* (The Russian Army Abroad) 12 (Belgrade, 1923). 2 million is also the number given in the American Red Cross Report for the Year Ending 30 June 1923, p. 69. The United Nations' *A Study of Statelessness* 7 (New York, August, 1949), gives for 1922, 718,000-772,000 Russian refugees in Europe and about 95,000 in the Far East.

⁶ L. W. Holborn, *loc. cit.*

⁷ N. Bentwich, *loc. cit.* 2.

⁸ A. Raestad, "Statut juridique des apatrides et des réfugiés," 39 *Annuaire de l'Institut de Droit International* 32 (I, 1936); see also A. N. Mandelstam, "Les dernières phases du mouvement pour la protection internationale des droits de l'homme," *Extrait de la Revue de Droit International*, 1933, No. 4, p. 4. Cf. F. Morgenstern, "The Right of Asylum," 26 *Brit. Year Bk. of Int. Law* 327 (1949): "According to general international law as at present constituted, the so-called right of asylum is a right of States, not of the individual." However, Art. 14 of the Universal Declaration of Human Rights reads: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

⁹ Smaller movements of refugees, such as the flight of the Mennonites in 1929 and 1930, took place, but the bulk of the refugees escaped in the years 1918-1922.

White Guard armies in Russia in 1919-1920, the famine of 1921, and the final collapse of the counter-revolution in Siberia in 1922. The Russians abroad consisted primarily of three groups: (1) the purely political emigration, including members of the Tsarist Government, different groups of the Provisional Government of 1917, individual opponents of the Red regime; (2) the military emigration, also predominantly political, and involving officers of the Imperial Russian Army, Cossack troops, personnel of the military administration; and (3) the civil emigration, partly of political refugees, partly of middle-class and peasant elements "escaping for economic reasons."¹⁰ The predominantly political motives for the emigration have tended to obscure two important features which link it to previous movements: one, that part of the flight over the frontiers to the West in 1921 and to the East in later years was due to the famine;¹¹ two, that the emigration included the Westward movement of great numbers of Jews and merely continued the historical mass flights of Jews which had started in the nineties and continued in the years preceding the war.¹² Besides the number of people involved, what distinguishes the post-1917 emigration from the prewar movements is its primarily political motivation, the large proportion of military men among the émigrés, the new category of refugees, namely "economic dissidents,"¹³ and especially the reactions of the Soviet Government to this displacement of population.

Internal Policy

Up to the time of the Soviet Government's Decree of December 15, 1921, the Russian exiles were stateless only *de facto*.¹⁴ They repudiated the

¹⁰ J. H. Simpson, *op. cit.* 83-84; also T. Schaufuss, "The White Russian Refugees," *Annals of the American Academy of Political and Social Science* (henceforth abbr. as *The Annals*), May, 1939, p. 45.

¹¹ The partly non-political nature of the emigration is evidenced, too, by the measures taken in various countries, notably Poland, against these economic refugees. See Report on the Work of the High Commission for Refugees, League of Nations Doc. A.30.1923.XII, p. 14: "The Polish Government also felt compelled to make arrangements for the expulsion of a very large number of refugees who had entered its territory since October 1920 in an illegal manner. These refugees were alleged to have left Russia not on political grounds but for economic and other reasons, and were causing the Polish Government considerable embarrassment. The Polish Government felt constrained to take measures to remedy this situation and issued a decree providing for the expulsion of all non-political refugees by April 15th, 1923, but at the same time emphasized that all refugees who could establish that they were seeking refuge in Poland for political reasons would be allowed to remain."

¹² J. H. Simpson, *op. cit.* 63-64.

¹³ The expression is used by J. Vernant, *The Refugee in the Post-War World* 6 (New Haven, 1953), in connection with post-World War II displaced persons, but seems to be just as applicable to certain categories of persons in 1917-1921. It also fits those "peasant victims of collectivization in the U.S.S.R." who "fled between 1929 and 1932, escaping individually to Poland, Rumania and the Baltic States." J. H. Simpson, *op. cit.* 84.

¹⁴ See the definition of *de facto* and *de jure* statelessness in United Nations, *A Study of Statelessness* 8-9. Not all stateless persons are refugees, but to be a refugee a person has to be either stateless *de facto* or stateless both *de facto* and *de jure*. This

new regime and were in fact repudiated by their country of origin, which turned its back on them and granted them neither admittance nor protection. Their circumstances were conditioned and pervaded by the consequences of this repudiation, which, however, was political, not legal,¹⁵ for *de jure* they remained Russian citizens:

Prior to the formation of the Union, the citizenship of the peoples in the Soviet Republics was determined by legislative acts and by treaties and agreements entered into by these Republics, in accordance with which Soviet citizenship was imposed upon those former Russian "subjects" who were not exempt in conformity with these acts or treaties.¹⁶

Moreover, the various Soviet Republics were linked by a series of treaties, conventions and agreements which tended in certain cases to extend the provisions of one Republic's legislation over the territory of all the others.¹⁷ Thus the failure of any Republic to regard as foreigners former Russian citizens of its ethnic origin, or residing in its territory, resulted in their being considered citizens by all the other Republics. An additional factor guaranteeing continued Soviet citizenship was that none of the legislative acts of the various Republics contained any provisions for renunciation of citizenship, other than by individuals belonging ethnically to the border states to which the Soviet Union had renounced all claims to sovereignty in the Treaty of Brest-Litovsk, or those residing within the territory of the Republic at the time of the formal application for denaturalization.¹⁸

was recognized, too, by the definition of refugees adopted in the Arrangement of May 12, 1926, and later taken over in the Convention of 1933, which is based not on denationalization, but on the fact that the party ceases to enjoy the protection of his state of origin. See also the "Definition of refugees accepted by the Institute of International Law at the Brussels Conference in 1936," 39 *Annuaire de l'Institut de Droit International* 294 (II, 1936), and United Nations Economic and Social Council, "Text of the proposed draft Convention Relating to the Status of Refugees" (Doc. E/1618, Feb. 17, 1950), p. 12.

¹⁵ J. L. Rubinstein, "The Refugee Problem," 15 *International Affairs* 721 (1936).

¹⁶ T. A. Taracouzio, *The Soviet Union and International Law* 82 (New York, 1935).

¹⁷ Such, for example, was the effect of Art. 1 of the Ukrainian Statute on Foreigners of 1924 and Art. 1 of the Statute on Foreigners of the White Russian S.S.R. which read: "As foreigners are to be regarded all persons in the White Russian S.S.R. who are not citizens of the White Russian S.S.R. or of any other Soviet Republic." See *Sobranie Uzakonenii i Rasporiazhenii R.K.P.U.* (A collection of the laws and ordinances of the Uk.S.S.R.) par. 237 (Kharkov, 1924), and *Sobranie Uzakonenii i Rasporiazhenii B.S.S.R.* (A collection of laws and ordinances of the White Russian S.S.R.), par. 148 (Minsk, 1922) (hereafter the periodic issues of this series covering the legislation of the U.S.S.R. and the various Republics will be cited as *Sobranie*, followed by the name of the Republic and the year of issue).

¹⁸ See the decree on denaturalization of Russian citizens issued by the Council of People's Commissars of the R.S.F.S.R. on July 2, 1918, *Sobranie R.S.F.S.R.*, 1917-1918, p. 595. Art. 2 of the Ukrainian decree of March 11, 1919, provided only for the renunciation of citizenship by persons of non-Ukrainian origin in the Ukraine, *Sobranie Uk.S.S.R.*, 1919, par. 351. Art. 10 of the Constitution of the Far Eastern Soviet Republic of April 27, 1920, provided the right of denaturalization to persons "residing in the Far Eastern S.S.R.," as also did the Decree of the Council of People's Com-

None of these provisions for voluntary loss of citizenship seem to have applied to former Russian citizens abroad ethnically not Polish, Finnish or Balt.

In the early years of the Revolution and Civil War, the Soviet Government, therefore, looked on the émigrés as *de jure* Russian citizens who had never lost their citizenship or legally severed their allegiance to the Soviet Union. Prior to 1921 the Russian papers and documents issued by the Tsarist Government or the Provisional Government were sufficient valid evidence of Russian citizenship. Upon the consolidation of the Soviet regime and the near collapse of the counter-revolution, the turning-point in the status of Russians abroad came with the adoption by the Soviet Republics of a policy new both to the Soviet Government and to international law, *i.e.*, the involuntary mass denaturalization of former citizens of Tsarist Russia.¹⁹ The first step was the issuance of a Circular by the People's Commissariat for Foreign Affairs on August 11, 1921, which authorized the representatives of the Soviet Government abroad to issue provisional identification certificates to persons "declaring themselves Russian nationals." Then came "the decree and laws of 1921 and 1921" which "virtually denationalized all Russian refugees."²⁰ The Decree of the Council of People's Commissars of the R.S.F.S.R. of December 15, 1921, practically identical to and superseding that of October 28, 1921,²¹ on "Forfeiture of Soviet Citizenship by Certain Categories of Persons Residing Abroad," provided for the loss of Soviet citizenship by:

1. Persons who had resided abroad uninterruptedly over 5 years and who had failed to take out before June 1, 1922, their passports or corresponding identification papers from Soviet representatives (this provision did not apply to countries in which there were no Soviet representatives).
2. Persons who had left Russia after November 7, 1917, without the permission of the Soviet authorities.
3. Persons who had voluntarily served in the Armies against the Soviets or participated in counter-revolutionary activities.
4. Persons who had the right to opt for Soviet citizenship but had failed to do so.

missars of the Georgian S.S.R. of July 11, 1922. See V. V. Egorev *et al.*, *Pravovoe Polozhenie Grazhdan i Yuridicheskikh Lits S.S.S.R. za Granitsei* (Legal status of citizens and juridical persons of the U.S.S.R. abroad) 92, note 31 (Moscow, 1926). It is true that Art. 9 of the Statute on Citizenship of the R.S.F.S.R. of 1920 and Art. 11 of the Statute on Citizenship of the R.S.F.S.R. of 1931 seem to imply a possibility of voluntary denaturalization, but it would appear that this referred to rights acquired under specific treaties and agreements on option of citizenship. *Sobranie S.S.S.R.*, 1920, and *Sobranie S.S.S.R.*, 1931, I, p. 343.

¹⁹ Cf. Charles De Visser, *Théories et Réalités en Droit International Public* (2nd ed., Paris, 1955): "Inaugurée par l'U.R.S.S. dès 1921 . . . cette pratique a fait de l'apatridie, autrefois considérée comme un accident et une anomalie, la condition de millions d'individus."

²⁰ W. Adams, "Refugees in Europe," *The Annals*, May, 1939, p. 43.

²¹ According to the Decree of Oct. 28, 1921, passports had to be taken out by March 1, 1922; the Decree of Dec. 15, 1921, extended the deadline to June 1, 1922. See *Sobranie R.S.F.S.R.*, 1921, pp. 710-711, and *ibid.*, 1922, I, pp. 7-8.

5. Persons other than those in (1) who had resided abroad and failed to register before June 1, 1922, with Soviet representatives.²²

The example of the R.S.F.S.R. was soon followed by the other Soviet Republics.²³ In connection with these laws and ordinances it must be noted that considerable differences exist in the legislation of the individual Republics, both as to the provisions and as to the date of passage of the legislation, the Russian nationals being the first to lose their citizenship, the Caucasians being the last. Moreover, the laws made no mention of persons who left Soviet territory without permission after the promulgation or after the deadline for registration. This last point was, however, soon remedied by two Circulars of the People's Commissariat for Foreign Affairs of April 10, 1923 (No. 89), and June 10, 1923 (No. 90), which deprived such persons of diplomatic protection but not of their citizenship. Whereas those who left Russia prior to and during the Revolution and Civil War became stateless *de jure*, those leaving after the triumph of the Soviets, and therefore repudiating not Russian, but Soviet citizenship, were rendered stateless only *de facto*.

With the formation of the Union in 1923 and the adoption of a new Union Constitution in 1924 the powers to legislate on citizenship were granted to the Union Government.²⁴ The previous policy of the various Republics on the involuntary loss of citizenship was reaffirmed and extended further by the provisions of Article 12 of the Statute of 1924, which is so basic as to warrant its reproduction:

The citizenship of the Union of S.S.R. is lost by:

A—Persons who have been deprived of Soviet citizenship in conformity with legislative acts of the Union Republics promulgated prior to July 6, 1923, or in conformity with the legislation of the Transcaucasian S.F.S.R.;

B—Persons who left the territory of the Union of S.S.R. both with the permission of the U.S.S.R. or any of the Union Republics or without the same, and who have not returned or do not return upon the request of the authorities;

C—Persons who have been released from Soviet citizenship in conformity with the provisions of law;

D—Persons expatriated by the decisions of the courts.²⁵

This was the last legislative act of the Soviet Union on the subject of mass denationalization of its former citizens, for the statutes on Soviet citizenship of 1930 and 1931 contained no provisions on involuntary loss of

²² See T. A. Taracouzio, *op. cit.* 119-120.

²³ Art. 8 of the Decree of the Council of People's Commissars of the Georgian S.S.R. of July 11, 1922, provided for involuntary loss of citizenship by persons who had become citizens of a foreign state, and persons who had entered the service of a foreign state without permission of the Georgian authorities. V. V. Egorev *et al.*, *op. cit.* 30. A Ukrainian decree of March 28, 1922, repeated almost exactly the R.S.F.S.R. decrees of Oct. and Dec., 1921, extending the time limit for registration to Jan. 1, 1923, *Sobranie Uk.S.S.R.*, 1922, par. 237. The laws of the White Russian S.S.R. of 1922 and the Transcaucasian S.F.S.R. of May 21, 1923, were similar to the R.S.F.S.R. decrees. *Sobranie B.S.S.R.*, 1922, par. 48, and V. V. Egorev *et al.*, *op. cit.* 35.

²⁴ Art. 1(u) of the Constitution of 1924.

²⁵ *Sobranie S.S.S.R.*, 1924, pp. 364-366, reproduced by T. A. Taracouzio, *op. cit.* 121.

nationality. The statute of 1924 unified and codified the measures taken by the individual Republics, added the concept of loss of citizenship due to failure to return upon the demand of the Soviet Government (the decrees of 1921 merely provided for registration at consulates and embassies and did not mention return home), and extended the status of *de jure* statelessness to individuals who were rendered merely *de facto* stateless by the Circulars of April and June, 1923.²⁶

On the subject of voluntary loss of citizenship, the Government of the Union adopted and modified the previous policies of the individual Republics, which permitted renunciation of allegiance only with the express permission of the Government of the Republic²⁷ or in accordance with the provisions of specific treaties on option of citizenship. Whereas the pre-Union laws of the separate Soviet Republics had permitted only the denaturalization of Soviet citizens residing within the Republics, the statute of the Union of 1924, Article 13, merely provided for renunciation of Union citizenship, "only with the permission of the Central Executive Committee of the U.S.S.R.," without any reference to the place of residence of the applicant. Article 14 of the statutes of 1930 and 1931 allowed renunciation of citizenship by persons within the Union by "the decree of the Presidium of the Central Executive Committee of the U.S.S.R. or by the Presidium of the corresponding Union Republic," and by persons residing abroad, "by the decree of the Central Executive Committee of the U.S.S.R."²⁸ In both cases, however, it was necessary to file a formal application, a step which the refugees abroad never took.

The attitude of the Soviet Union towards Russian exiles, as reflected in its internal measures, may, therefore, be summarized as follows: In the early years of the regime, all Russian citizens abroad were regarded as *bona fide* citizens of the Soviet Union; in the second period which began

²⁶ See above. Between April-June, 1923 and 1924, the juridical status of these individuals had been identical to that of the Italian refugees affected by the Fascist Government's decrees refusing them assistance and protection, but not denationalizing them. But whereas the Italians were never considered as refugees and given that international legal status, the Russians were so regarded and treated by the various international relief organizations. On the Italians, see G. Nitti, "Les émigrés italiens en France," 3 Rev. Gén. de Droit Int. Public (3rd ser.) 729-759 (1929), and A. Colaneri, *De la condition des "Sans-Patrie"* 31 (Paris, 1932).

²⁷ See the Decree of the All-Ukrainian Executive Committee of March 28, 1922, *Sobranie Uk.S.S.R.*, 1922, p. 238; Decree of the Council of the People's Commissars of the White Russian S.S.R. of Aug. 4, 1922, *Sobranie B.S.S.R.*, 1922, p. 148; Decrees of the Council of People's Commissars of the Georgian S.S.R. of July 11, 1922, and Feb. 5, 1924, cited in V. V. Egorev *et al.*, *op. cit.* 30; also Art. 1 of Decree of the Council of People's Commissars of the Transcaucasian S.F.S.R. of April 5, 1923, *Sobranie R.S.F.S.R.*, 1923, pp. 98-99.

²⁸ See *Sobranie S.S.S.R.*, 1931, I, pp. 342-344. Art. 7 of the Soviet Citizenship Act No. 198 of Aug. 19, 1938, merely provides for "forfeiture of the citizenship of the U.S.S.R." by "decree of the court of law in instances prescribed by law," or by "special order of the Presidium of the Supreme Council of the U.S.S.R. in a special case." See *Sbornik deistvuyushchikh dogovorov, soglashenii i konventsii, zakluchennykh SSSR s inostrannymi gosudarstvami* (Collection of treaties, agreements and conventions concluded between the U.S.S.R. and foreign Governments and in force), 1955, X, p. 224 (hereafter cited as *Sbornik dogovorov*).

in the latter part of 1921, Soviet Russian citizenship was denied to Russians abroad, adding *de jure* to their already *de facto* statelessness and requiring special registration to retain Soviet nationality, and in 1924 making expatriation result in loss of citizenship. Both these latter measures were innovations in the conduct of states and in international law. "Russia alone has systematically deprived its refugees of their nationality."²⁹

Side by side with the Soviet laws and decrees on loss of citizenship, a number of legislative and executive decrees and ordinances provided for ways in which Soviet nationality might be recovered by refugees from Russia. In the early years these unilateral measures took the form of repatriations and amnesties.

It must be noted that the very decrees which first instituted mass denationalization, those of October and December, 1921, already provided that two categories of those affected by the decrees, *i.e.*, persons who left Russia after November 7, 1917, without the permission of the Soviet authorities, and persons who voluntarily served in the armies against the Soviets or who had participated in any kind of counter-revolutionary organizations, could apply for a restitution of their citizenship by filing applications to that effect addressed to the All-Russian Central Executive Committee.³⁰ These individuals and those who had retained their original Soviet citizenship by registering before the deadline set by the decrees were not required to take any further steps and simply remained Soviet citizens abroad. However, this situation was qualified by the statute of 1924, which provided for loss of citizenship upon refusal or failure to return at the request of the authorities. In view of the fact that "military service in the Armed Forces of the USSR is an honorable duty of the citizens of the USSR," and that "universal military service is law,"³¹ individuals of military age among those refugees who retained Soviet citizenship were all sooner or later faced with the alternative of returning to the U.S.S.R. or losing their citizenship. It is in connection with this that repatriation first established itself as an important factor in Soviet internal law of nationality and citizenship.

Another aspect of Soviet domestic legislation on the citizenship of its refugees abroad was reflected in a series of amnesties proclaimed in the U.S.S.R. granting full pardon to certain specific categories of its former nationals. A number of such amnesties, either specifically aimed at Russians abroad or including among other provisions measures pertaining to refugees beyond the frontiers of the Soviet Union,³² were announced.

²⁹ W. Adams, *loc. cit.*

³⁰ Art. 2 of the Decree of Dec. 15, 1921, on "Forfeiture of Soviet Citizenship by Certain Categories of Persons Residing Abroad." See *Sobranie R.S.F.S.R.*, 1922, I, pp. 7-8.

³¹ Art. 132 of the Constitution of the U.S.S.R. as amended 1936. See also V. M. Chkhikvadze, *Sovetskoe Voenno-Ugolovnoe Pravo* (Soviet Military Criminal Law) 293 (Moscow, 1948).

³² See, for example, "Amnesty Granted on the Occasion of the Third Anniversary of the Liberation of Minsk," July 11, 1923, *Sistematischeskoe Sobranie Deistvuyushchikh Zakonov S.S.S.R.* (Systematic collection of the laws in force in the U.S.S.R.),

They were couched in such language as to suggest that

together with the remission of punishment and the right of repatriation, *upon condition of immediate return*, option for Soviet citizenship is automatically involved by the registration required of such former Russian nationals.³³

These amnesties, which played a very important rôle in the early days of the Soviet regime, were either so worded as to grant amnesties to particular groups of émigrés or were drawn in more general terms.³⁴

The unilateral repatriation encouraged by these amnesties did take place in the early years after the Revolution, and a number of persons returned to the Soviet Union independently, *i.e.*, not under the auspices of any international agreements between the U.S.S.R. and other states or international agencies. "The few thousand men who sought repatriation in the early days were Cossacks."³⁵ In 1921 a French application to the Soviet Government to permit the repatriation of part of General Wrangel's army from Constantinople and other centers in the Levant met with no success, but about 3,300 Russians willing to return at their own risk were embarked on a Turkish vessel and landed at Novorossiisk. No authentic information exists regarding their reception, although it is assumed that most of them, being ordinary soldiers, returned to their original homes. An additional 725 soldiers returned to Batum prior to August, 1921.

Precise statistics do not exist, due to the very nature of the problem, many individuals finding their way home singly or in small groups of which no records were kept. Nevertheless, it can be safely assumed that independent repatriation did not involve a very considerable number of persons, most returnees being sponsored and protected by special agreements concluded between the R.S.F.S.R., or U.S.S.R., and the High Commission for Refugees, which included special provisions for amnesty of the repatriates. It must be noted, however, that amnesties were granted only to certain well-specified categories of persons, and included some novel provisions, such as limitation of the pardon solely to men of working-class origin, or to peasants, or only to the enlisted personnel of the armed forces, or to certain racial minorities. Amnesties were expressions of the Soviet theories of the class struggle, of the concept of the Soviet Union as a

I, pp. 416-418 (Moscow, 1926). This amnesty granted by the White Russian S.S.R. gave pardon to White Russians of working-class origin, members of anti-Soviet formations of 1918, 1919 and 1920; to White Russian political and cultural leaders, formerly members of anti-Soviet organizations, declaring their loyalty to the Soviet authorities; to former members of the White Russian Social Democratic and other parties who declared their loyalty to the Soviet authorities; and, finally, to White Russian peasants formerly involved in anti-Soviet activities, *including those who had fled abroad* (italics supplied). Only peasant refugees seem to have been covered by the amnesty.

³³ T. A. Taracouzio, *op. cit.* 116 (italics supplied).

³⁴ A list of these amnesties, both special and general, may be found in T. A. Taracouzio, *op. cit.* 115-116, and 115, note 87, and V. V. Egorev *et al.*, *op. cit.* 28. The amnesty for persons expelled from Poland, of Aug. 11, 1923, seems to apply to the persons involved in the expulsion of non-political refugees carried out by the Polish Government after 1920. See note 11 above.

³⁵ J. H. Simpson, *op. cit.* 91.

workers' and peasants' state, and of the national minorities policy of the U.S.S.R. At no time were amnesties all-inclusive or repatriation non-selective.

An additional domestic measure of the U.S.S.R. contributed to swelling the ranks of the Russian refugees abroad by a category of persons, "expatriated by the decisions of the courts" and deprived of their nationality by the statute of 1924. The Criminal Code of the R.S.F.S.R. of 1924, Article 20, clause "a," provided for the declaration of a person as "an enemy of the toiling masses" as a measure of "social protection," with consequent loss of the citizenship of the R.S.F.S.R., and of the U.S.S.R., and compulsory banishment from Soviet territory.³⁶

In conclusion, the internal policy of the Soviet Republics, and then of the Union, may be analyzed as having the following purposes: In the early years of revolutionary optimism, citizenship was granted to everyone; with the increased cooling off of revolutionary fervor, the growing difficulties at home, the resistance encountered by the Soviet regime, a stiffening of attitude took place and, on the maxim that "all those who are not for us are against us," mass repudiation of the refugees by denaturalization took place, alleviated only here and there by amnesties, decrees and permissions to repatriate to limited numbers of chosen and reliable elements, usually of proletarian origin. Internally this process of cleansing its ranks was carried out by the Soviet Union through the use of Article 20 of the Criminal Code and expulsion.

Foreign Policy

Regarding the Russian refugees abroad not as mere refugees, but as "direct henchmen of world-wide capitalism, supported by it and working for it,"³⁷ and "in the belief that the refugees were continuously conspiring against Communist policy,"³⁸ the foreign policy of the Soviet Union after the consolidation of the new regime aimed at neutralizing or destroying the Russian émigré movement. This policy varied according to whether it involved relations with the border states formerly members of the Russian Empire, with other states most of which in the early days did not recognize the Soviet regime, or with the League of Nations.

The first international relations of the Soviet Union involved treaties

³⁶ The use of this measure was further extended by the inclusion in Art. 7 of the Soviet Citizenship Act No. 198, of Aug. 19, 1938, of the provision for the forfeiture of citizenship by "decree of a court of law in instances prescribed by law." See *Vedomosti Verkhovnogo Soveta SSSR*, 1938, No. 11, and M. Shargorodsky, *Voprosy Obshehei Chasti Ugolovnogo Prava* (General questions of criminal law) 179-180 (Leningrad, 1955). Somewhat similar in its effects of denaturalization is the "outlawing" envisaged in the Decree of the Central Executive Committee of the U.S.S.R., Nov. 21, 1929, titled, "On the declaration as outlaw of officials—Soviet citizens abroad, who have fled into the camp of the enemies of the working class and peasants, and who refuse to return to the U.S.S.R." See M. Shargorodsky, *op. cit.*, and Ya. M. Brainin, *Sovetskoe Ugolovnoe Pravo* (Soviet criminal law), I, p. 147 (Kiev, 1955).

³⁷ V. I. Lenin, *Sochineniya* (Collected Works), Vol. 32, p. 256, quoted in *Akademiya Nauk SSSR, op. cit.* 239.

³⁸ W. Adams, *loc. cit.*

and agreements with the border states which seceded from Russia after the Revolution and during the Civil War. The early Soviet attempts at solving its refugee problem were formulated in these treaties, and considerable variations exist in the manner in which the U.S.S.R. tried to settle the question, though all included an offer of option of Soviet citizenship.

Thus the Treaty of Peace of February 2, 1920, with Estonia provided that all persons of non-Estonian origin residing in Estonia and aged eighteen or over had the right to opt for Russian citizenship, with the provision that persons opting for Russia were to leave Estonia for the U.S.S.R. within one year from the date of such option. It would seem that the provisions of this treaty did not involve the status of refugees, applying as it did only to persons residing in Estonia, and not just to those present there. It would also appear that those persons of non-Estonian origin, including persons of Russian origin, who were residing in Estonia at the time of the Treaty of Peace were recognized as Estonian nationals who, failing to opt for Russian citizenship, automatically retained their Estonian citizenship, thus not being affected by the Soviet denaturalization decrees of 1921 and 1924. More directly relating to refugees was the Agreement of August 19, 1920, which provided for the return to their country of persons who did not come under the qualifications of optants as understood in the Treaty of Peace. Thus earmarked for return to Russia were military and civil prisoners of the World War and the Civil War, hostages, members of families whose heads resided in the Soviet Union, refugees, members of the former North-Western Anti-Bolshevist Army of General Yudenich, who were in Estonia at the time of the signature of the Agreement. In spite of these provisions which envisaged the return to Russia of all Russian refugees and members of anti-revolutionary forces, 16,000 Russian refugees were estimated to be in Estonia at the end of 1921, and on January 1, 1930, it was estimated that 11,210 Russian refugees still remained there. These non-optants came under the provisions of the denaturalization decrees of 1921 and 1924, thus acquiring *de jure* statelessness in addition to their *de facto* statelessness.

Very similar to the Treaty of Peace with Estonia was the Treaty of Peace concluded on May 7, 1920, between the R.S.F.S.R. and the Georgian Republic, and the Agreement on the Manner of Option for Georgian Nationality of December 9, 1920.³⁹ As in the Treaty of Peace with Estonia, the one with the Georgian Republic extended the right to opt for Russian citizenship not only to persons of Russian origin residing in Georgia, but generally to persons of non-Georgian race residing in Georgia.

The various agreements between the R.S.F.S.R. and Latvia⁴⁰ extended the unconditional right of option to the citizenship of the contracting

³⁹ For the text of the Peace Treaty with Estonia, see *Sbornik dogovorov*, 1922, I, pp. 100-116 (English text in L. Schapiro (ed.), *Soviet Treaty Series*, I, pp. 34-38 (Washington, D. C., 1950)); for the texts of treaties with Georgia, see *Sbornik dogovorov*, 1921, I, pp. 27-33, 135-138; also L. Schapiro, *op. cit.* 44-46, 82-83.

⁴⁰ For texts of treaties, see *Sbornik dogovorov*, I-II, pp. 37-48 (2nd rev. ed., 1928); *ibid.*, 1924, I, pp. 177; 1921, I, p. 153; for English texts see L. Schapiro, *op. cit.* 48-49, 54-58, 123-124, 138-141.

parties to all persons and refugees in the territory of either state. Russian citizenship could also be opted by Latvians in the territory of a third state. Option of citizenship of either party was followed by repatriation. All Russians within the territory of Latvia who failed to opt for Russian nationality automatically remained Latvian nationals, under the provisions of clause 1 of Article 8 of the Treaty of Peace. Since most of these agreements were concluded in 1920, and did not affect persons of either state who entered the territory of the other after the dates of ratification, a number of Russian refugees who entered Latvia after 1920-1921 and came within the scope of the denaturalization decrees became stateless persons. Their numbers in 1929-1930 were variously estimated as between 9,808 and 30,000.⁴¹

The various treaties between the R.S.F.S.R. and Lithuania, and between the Ukrainian S.S.R. and Lithuania⁴² were quite similar to the agreements with Latvia, except that not all persons residing in Lithuania at the time of ratification of the treaties were to be considered as Lithuanian citizens. This barred most Russians in Lithuania, and especially those who had resided there in the service of the Russian Crown, from being recognized as Lithuanian citizens. Granted the right to opt for Russian nationality and return to the U.S.S.R., a failure to choose it resulted in statelessness, first *de facto*, and then, in 1924, also *de jure*. In 1929-1930, Russian refugees in Lithuania numbered between five and eight thousand.⁴³

The Treaty of Peace with Poland, signed at Riga, March 18, 1921, provided that former Russian subjects of non-Polish origin within Poland, "eligible for registry with the rural, municipal or corporate bodies in the territory of Poland or whose names have been entered in census books as permanent residents of Poland," had Polish nationality, but could opt for Russian citizenship. All other former subjects of Russia of non-Polish origin continued to be Russian nationals. Thus all refugees in Poland retained Russian citizenship until the denaturalization decrees of 1921-1924. Those eligible to opt for Russian citizenship who availed themselves of the right were not obliged to repatriate, but under Article 7 could be compelled to do so by the Government of Poland. Between 50,000 and 100,000 Russian refugees were estimated to be in Poland in 1929-1930.⁴⁴

On May 27, 1920, there was concluded a Russian-Sinkiang Agreement on Trade and Refugees, Article 7 of which reads as follows:

⁴¹ The first number is an estimate given in 1930 by a Sub-Committee of the Consultative Committee of Private Organizations attached to the High Commission's Geneva Office; the second represents figures given by the High Commission, Doc. A.23.1929.VII.

⁴² The Treaty of Peace with the R.S.F.S.R., July 12, 1920; the Agreement with the R.S.F.S.R. on the Manner of Option for Lithuanian Citizenship, June 28, 1921; a similar agreement with the Uk.S.S.R., Jan. 28, 1921; and an Agreement with the Uk.S.S.R. on Provisional Rules Regulating the Transportation of the Property of Persons who Have Opted for Lithuanian Citizenship, April 5, 1922. For texts, see *Sbornik dogovorov*, I-II, pp. 59-68 (2nd rev. ed., 1928); *ibid.*, 1924, I, p. 178; also see *Recueil des Traités Conclus par la Lithuanie avec les Pays Etrangers*, I, 1919-1929, pp. 30-45, 98-105, 67-72, 24-29 (Kaunas, 1930).

⁴³ See note 41 above.

⁴⁴ *Ibid.*

The Russian Delegation declares that the amnesty promulgated by the Tashkent Government is to respect humanity and is a resolution which cannot be encroached upon under any circumstances, and that after this explanation there would be of course no danger in the return to Russia of defeated soldiers and refugees. The Chinese authorities will certainly exhort them to their utmost to return to Russia so that each may follow his trade peaceably.⁴⁵

As a result of the Soviet assurances, the Governor of the Province of Sinkiang succeeded in repatriating a certain number.

Treaties were also concluded with Finland and Turkey, but they did not contain any provisions on refugees.⁴⁶

An examination of these treaties concluded between the Soviet Republics and various border states reveals many unusual features. Thus, in all of them the right to opt for Soviet citizenship was granted not only to Russians in the border states, but generally to persons not of the ethnic origin of the other party to the agreement on option, *i.e.*, non-Estonians, non-Georgians, non-Poles. Russian citizenship was thus made available to persons who had never been Russian citizens prior to the Revolution. Another unique aspect is that the Treaty of Peace with Latvia granted the right to opt to every person on the territory of either contracting party, regardless of former or present citizenship or race. Most treaties provided for repatriation after option, except the Treaty of Riga with Poland. In fact, however, Poland exercised the right to compel the optants for Russian citizenship to return home. Apart from the Agreement with Estonia of August 19, 1920, no transfer of refugees was envisaged except for those who freely chose to return. Expatriation by option in accordance with the provisions of these treaties seems to have been recognized by the U.S.S.R. as the only way of voluntarily losing Soviet citizenship besides formal individual application to, and by permission of, the governmental authorities.

All the above-mentioned treaties insured the recognition of the Soviet Union by the border states. Therefore all Russian refugees within their territories were regarded, when deprived of their Russian nationality by the denaturalization decrees, as truly stateless and their position was rendered very difficult. In the 1920's Poland undertook to expel all Russian non-political refugees from its territory. Also

there was a great deal of difficulty in maintaining the refugees in the small Border States, for whom it was essential to come to some *modus vivendi* with the U.S.S.R. The political heads of the emigration were forced to leave for Berlin or elsewhere.⁴⁷

⁴⁵ Extracts of the text of the Agreement may be found in J. Degras (ed.), *Soviet Documents on Foreign Policy, I: 1917-1924, Addendum*, pp. 483-484 (London, 1951).

⁴⁶ The Treaty with Finland provided only for option of the population of the Pechenga area; the Treaty between the R.S.F.S.R. and Turkey, March 16, 1921, and the Treaty of Friendship between the S.S.R. of Armenia, Azerbaijan, and Georgia on the one side, and Turkey on the other, with the participation of the R.S.F.S.R., signed at Kars, Oct. 13, 1921, provided for options in ceded territory only and for return of "prisoners of war and civilian prisoners." See J. Degras, *op. cit.* 237-242, 263-267, and *Sbornik dogovorov* 134, 114, 120 (2nd rev. ed., 1928).

⁴⁷ J. H. Simpson, *op. cit.* 75.

Thus did the U.S.S.R. achieve the neutralization of the political aspects of the emigration on most of its European frontier. After the Russo-Turkish Treaty, concluded in 1925, the Ankara Government pledged itself to receive no more Russian refugees, and those still in Turkey were required either to accept Turkish nationality or to leave the country before August 1, 1927. The naturalization of some 1,800 Russian refugees who had been accepted by the Turkish Government was completed by 1938.⁴⁸ The others were forced to leave the country.⁴⁹ In Turkey, too, the Soviet Union achieved its objective by either forcing the elements of the emigration hostile to it to leave the country or neutralizing them just as effectively by making the Turkish Government responsible for the actions of those who were naturalized. Naturalization usually involves assimilation, and therefore tends to absorb and render inoffensive an alien element, which otherwise might remain troublesome. Naturalization in or departure from the territory of its neighbors, preferably the second, was the Soviet aim for its refugees residing there.

With other states the Soviet Union could not deal in the same manner as it did with former members of the Russian Empire and Turkey. Two different pressures were exerted by the U.S.S.R. The first, unofficial, was the policy of getting recognition of the Soviet regime by these states, which had a psychological effect on the emigration, and of entering into treaties and agreements with such states, thus dashing all hopes of the militant émigrés for the overthrow of the Red regime; the second policy provided for entering into specific agreements on refugees with those states which recognized the Soviet Government or were willing to deal with it.

In the states of Western and Central Europe which did not recognize the Soviet Government, the Russian émigrés were regarded as foreigners,⁵⁰ subjects of Russia under the diplomatic protection of recognized representatives of the Russian Provisional Government, and not as stateless refugees. Nevertheless, even prior to their recognition of the Soviet Government, a number of Western governments entered into agreements with it for the repatriation of nationals. Though most of these agreements were concluded for the purpose of exchanging war prisoners, and will be treated separately, the provisions of some of them included repatriation of civilians.⁵¹ Repatriation was conducted in conformity with the general rules, *i.e.*, exchange and free consent of the repatriates.

After the recognition of the Soviet Government by the governments of the major states the status of the Russian refugees rapidly deteriorated.

⁴⁸ Nansen International Office for Refugees, Report by M. Michael Hansson, Former President of the Governing Body of the Nansen International Office for Refugees, on the Activities of the Office from July 1st to December 31st, 1938, p. 1.

⁴⁹ Reports by the High Commissioner for Refugees, March 10, 1924, Extract No. 25, from the Official Journal, p. 2.

⁵⁰ See I. M. Rabinovich, *Russkie v Germanii*, *Yuridicheskii Spravochnik* (Russians in Germany, Legal Reference) 68-69 (Berlin, 1921).

⁵¹ Conventions with Great Britain, Feb. 12, 1920; France, April 20, 1920; Italy, April 27, 1920; Belgium, April 20, 1920; and Denmark, Dec. 18, 1919. For texts, see *Sbornik dogovorov*, 1921, I, pp. 120-123, 156-162, 141-142, 119 and 139-140.

The decrees of denaturalization of 1921-1924 were given effect,⁵² and from foreigners with the attendant privileges of that status, the Russian émigrés in France, Great Britain and other countries were transformed into stateless refugees, with a consequent worsening of their juridical and material position. The unemployment, jailings and expulsions of these individuals, multiplying with the growth of the economic depression in the Europe of the 1930's, coupled with the abandonment of any possibility of a counter-revolution, increased the hopelessness of the situation of the Russian exiles, forcing them either to emigrate to the Western Hemisphere, to settle down and get naturalized, or to return. All these alternatives spelled the end of organized activities effectively dangerous to the Soviet Union close to its borders. The success of the pressure exerted by the policies of the U.S.S.R. was evidenced by the consequences of the signing of the Franco-Russian Agreement of 1936: thousands of émigrés presented themselves in the Soviet consulates asking for permission to return and "the Soviet Government selected and examined their requests very carefully and accepted only those which seemed to it to have been made in good faith."⁵³

Another series of agreements was concluded by the R.S.F.S.R. either directly with the League of Nations High Commission for Refugees, or with other states but under its auspices, providing for the repatriation of Russian refugees. Two separate streams of repatriation may be distinguished: one of Russian refugees, the other of Armenians to the Soviet Republic of Erivan, and considerable differences exist between the two.

The first agreement⁵⁴ for repatriation concluded under the auspices of the League of Nations was the one in which the Soviet Union agreed to receive approximately 5,000 refugees, at the rate of 2,000 per month, from Greece and Bulgaria, provided they were Cossacks from the "Don, Kuban and Terek Provinces, where the economic conditions were considered favourable for their reception," and provided that the repatriation was voluntary and that the candidates were screened individually and approved by a Soviet repatriation commission. The repatriates were granted "complete amnesty"⁵⁵ and according to the "High Commission's representatives in Russia . . . the concessions obtained from the Soviet Government have been loyally observed."⁵⁶ No obligations were assumed by the Soviet Government in connection with individuals who returned without taking the necessary steps such as previous application and screening. Moreover, a number of individuals were returned from Novorossiisk, in the Soviet Union, as being unacceptable to the U.S.S.R.⁵⁷

⁵² See A. N. Makarov, "Règles Générales du Droit de la Nationalité," 74 *Recueil des Cours de l'Académie de Droit International de La Haye* 323 (1949).

⁵³ Carmen Ennesch, *Émigrations politiques d'hier et d'aujourd'hui* 123-124 (Paris, no date). He also states that the number of Russian émigrés who returned home in 1935 was greater than the total for 1933 and 1934.

⁵⁴ United Nations, *A Study of Statelessness* 165.

⁵⁵ See "Letter from the Soviet Government to the High Commission in Reply," Report on the Work of the High Commission for Refugees, Sept. 4, 1923 (Doc. A.30.1923.XII), pp. 16-18.

⁵⁶ *Ibid.* 2.

⁵⁷ *Ibid.* 18.

The repatriation of refugees from Hungary had to be carried out through the High Commission due to the absence of relations between the Hungarian Government and the Soviet Government. In 1924, 200 Russian women who were brought to Hungary by former Hungarian prisoners of war and about 300-400 Russian prisoners of war were repatriated with the consent of the Soviet Government. In 1923, 512 ex-Russian soldiers were repatriated from Germany and it was reported that 150 refugees per month were being returned from Constantinople in 1922-1923. In 1924, 1,000 Jews returned to Russia from Rumania, and 17,000 Russian refugees were repatriated from Manchuria and China via Chita under the supervision of representatives of the High Commissioner.⁵⁸ All in all, the Soviets claim that 181,000 refugees were repatriated.⁵⁹ Western estimates vary between 13,000⁶⁰ and 15,627,⁶¹ though they give numbers only up to 1924.

It must be noted, though, that repatriation was relatively easy only up to 1924, becoming remote after that date, with long delays and frequent refusals even to young people applying for repatriation. Repatriation was also conditioned by the economic situation in the U.S.S.R. and the political atmosphere. In the early period, prior to the denaturalization laws, the Soviet Union provided rapid repatriation with full amnesty to those residing in the border states, who formed the great majority of the Russian emigration. After the denaturalization laws the stiffening of the Soviet attitude made return both more dangerous and more difficult.

In 1951, a Soviet jurist affirmed that after World War I:

the return of refugees took place on voluntary principles, in connection with which, in general, it was foreseen in the treaties that the State, to the nationality of which the refugees belonged, cannot refuse to receive them back in the face of the unwillingness of the other State to leave the refugees and displaced persons on its territory. However, the receiving State was given the right to refuse the permission of entry into its territory to individual undesirable persons.⁶²

Yet in actual practice the repatriation movement affected relatively small numbers of exiles, and high selectivity was practiced by the Soviet Government, which strictly limited and carefully processed the return of applicants to its territory. Attempts to return without permission were strictly punished and resulted in protests to governments from whose territories the returnees came.⁶³ It would seem that the U.S.S.R. did not really want to repatriate all its former nationals, only certain categories of individuals, and rather preferred the absorption of the rest into their new countries of residence.

To make this assimilation more rapid the Soviet Union first divested the refugees of all allegiance to the U.S.S.R., and then took measures to make their life unbearable, thus forcing them to naturalize, settle down and

⁵⁸ Reports of the High Commissioner for Refugees, March 10, 1924, Extract No. 25, p. 12.

⁵⁹ Quoted by J. H. Simpson, *op. cit.* 107.

⁶⁰ D. Thompson, *op. cit.* 25.

⁶¹ N. Bentwich, *loc. cit.* 17-18.

⁶² O. E. Polents, *Akademiya Nauk SSSR, op. cit.* 349.

⁶³ See J. Degras, *op. cit.*, II, p. 124: "Protest from Chicherin to the Bulgarian Foreign Minister against Forceful Repatriation into Soviet Territory, 13 July 1926."

abandon their counter-revolutionary ways. The Soviet Government used the allegation that the émigrés plotted against the Soviet Union as a reason for strong protests at Geneva against the continuance of League protection to Russian refugees. Diplomatic pressure made it very difficult for the border states to permit organized refugee life within their territory. In 1920, when Poland was at war with the Soviets, detachments of Russians and Ukrainians fought on her side. By the terms of the armistice ending Pilsudski's offensive, Poland undertook the dismissal and liquidation of her anti-Bolshevik Russian allies, who, for the most part, had taken refuge in Polish territory. These armed forces were interned. Other states, too, were embarrassed by the Soviet pressure, as when V. Molotov remarked at the First Session of the Supreme Soviet in 1938 that in France especially

find themselves a home adventurers and criminal organizations of such a nature as to be nothing more than a viper nest of terrorists and diversionists. . . . Of course, this cannot be excused on the ground of the rights of asylum for foreigners.⁶⁴

In the earlier days, when the dangers of a counter-revolution were greater, diplomatic pressure took the more direct form of notes addressed to the League⁶⁵ and to various governments. Thus:

In the note of the People's Commissar for Foreign Affairs addressed in the name of the Foreign Minister of Great Britain, Curzon, on June 17, 1921, the Government of the USSR was forced to declare that it would consider as a direct support of Russian counter-revolutionary forces all aid given to the remnants of the Russian rebel forces . . . and also all aid given through the intermediary of various so-called "Russian Committees" or "councils," which, under pretext of help to Russian refugees, in fact are centers of counter-revolutionary activities.⁶⁶

On October 19, 1923, a similar note was addressed to the Finnish Government in connection with the question of the Eastern Karelian Committee and Karelian refugees.

After the entry of the U.S.S.R. into the League of Nations, it found itself involved in the discussions on the refugee problem, and "followed a course at Geneva which practically destroyed the Nansen Office and the whole scheme of international protection for the refugees."⁶⁷ In 1937, the Sixth Committee made efforts to obtain unanimity in favor of a resolution which pointed out the obligation of the League of Nations for the legal and political protection of refugees, but met with the resistance of the Soviet representative and failed. It was also despite the opposition of the U.S.S.R. Delegation, which objected to any kind of protection for the "White Russian" refugees, that the Assembly, in a resolution adopted on September 30, 1938, decided to set up a single High Commissioner's Office

⁶⁴ *Pervaya Sessiya Verkhovnogo Soveta, Stenograficheskii otchet* (First Session of the Supreme Soviet, stenographic report) 153 (Moscow, 1938).

⁶⁵ Note of June 10, 1921, from Chicherin to the League of Nations, cited in M. A. Tsimmerman, *Ocherki Novogo Mezhdunarodnogo Prava* (Outlines of the New International Law) 177, note (Prague, 1924). ⁶⁶ Quoted in *Izvestiya*, Oct. 19, 1923.

⁶⁷ W. Adams, *loc. cit.* 43.

responsible for all League work for refugees, namely, legal protection and the co-ordination of material aid for all categories of refugees hitherto cared for by the two predecessor bodies.

Limited repatriation, unlimited hostility, innumerable obstructions to international protection, bold innovations in international law and relations, these were the policies of the U.S.S.R. towards Russian refugees from 1921 to 1939. By 1939 the position of the Russian refugees had become stabilized, and their numbers, decreased by death,⁶⁸ naturalization and repatriation, were estimated at somewhat over 150,000 in Europe and 50,000 in the Far East.⁶⁹ In conclusion it may be said that:

It is above all the Russian refugees who have developed since the War what may be called the jurisprudence of refugeedom and contributed to political philosophy and practice a concept of refugee as novel and creative as the concepts of minority and mandate.⁷⁰

In this they were ably helped by the novel and "creative" policies of the Soviet Government. But with the coming of the second World War and its conclusion the Soviet attitude towards its refugees made a complete *volte-face*.

A somewhat different problem was presented by, and a different solution was found for, the Armenian refugees who repatriated to the Soviet Republic of Erivan. First, it must be noted that the Armenians who were resettled in Soviet Armenia were not originally natives and subjects of Russia, but had fled from Turkey and other Moslem countries where they had been persecuted. Since repatriation means essentially a return to the homeland, in the case of the Armenians who came to Erivan it was not repatriation, strictly speaking, but resettlement or emigration.

The greater part of the Armenian emigration into Russia and Russian Armenia took place spontaneously when, escaping from Turkish persecution during the first World War and after the Turkish occupation of Kars and Ardahan, an estimated 525,000 Armenians fled to Russia, of whom 400,000 remained in Russian Armenia.⁷¹ Smaller movements occurred in 1921-25, 13,539 arriving from various Near Eastern camps and 77,000 more being expected shortly.⁷² An additional estimated 115,000 refugees escaped to France, Greece, Bulgaria, Rumania, Cyprus and other countries. It was on behalf of the latter that the High Commission for Refugees undertook negotiations with the Soviet Government and the Soviet Republic of Erivan. In 1925, the Commission reported to the League of Nations that

⁶⁸ See Special Report Submitted to the Seventeenth Assembly of the League of Nations by M. Michael Hansson, Acting President of the Governing Body, Sept. 17th, 1936 (Doc. A.27.1936.XII), p. 4: "... among Russians, who form the vast majority of the refugees, the death rate has played an important role in decreasing the number of refugees."

⁶⁹ J. P. C. Carey, *The Role of Uprooted People in European Recovery* 22-23, estimates 150,000 and 90,000, respectively, for Europe and the Far East in 1946. In 1937, the last figures available gave 356,000 in Europe and 94,000 in the Far East, for a total of 450,000. See J. Vernant, *op. cit.* 54.

⁷⁰ J. H. Simpson, *op. cit.* 108.

⁷¹ *Ibid.* 34.

⁷² Report by Dr. F. Nansen, July 28, 1925, p. 3.

the Armenian Soviet Government has agreed to accept 1,000 refugees from Greece and a further 7,000 during the next year from Constantinople and Greece.⁷³

In 1927, the Greek Government had made an arrangement with the Soviet Government for transfers from Greece to Erivan, and as a result 7,000 Armenians emigrated from Greece to Soviet Armenia. In 1934, it was reported that 8,500 Armenian refugees were transferred from Bulgaria, France and Greece during the past three years. In 1935 difficulties developed due primarily to the deterioration of the economic situation in Armenia, and to the League's requests for further admissions "the Government of the Union of Soviet Socialist Republics replied that it was not their intention at present to increase the number of 20,000 refugees already settled in the Republic."⁷⁴ Nevertheless, on May 9, 1936, a further convoy of 1,783 Armenian refugees, chosen from a list of 7,000 who had registered for settlement in Soviet Armenia, was transferred from France to Erivan, the total number of refugees so far transferred by the Office to Erivan being given then at 10,280, and the Republic of Erivan was understood to be willing to receive several more thousands of Armenian refugees.⁷⁵ In September, 1936, a special report to the League of Nations stated that an additional 8,497 Armenian refugees, chosen mainly among the poorest in Greece and Bulgaria, had been transferred to the Republic of Erivan with the consent of the Soviet authorities, who had constantly encouraged this undertaking.⁷⁶ It has been estimated that from 1926 to 1936, 15,525 Armenians had gone to Erivan.⁷⁷ Approximately 11,000 Armenians in Greece and France hoped to follow them, when the repatriation program broke down due to lack of funds and economic difficulties in Soviet Armenia. In addition, a number of Armenian former "prisoners of war and civilian prisoners resident on the territory of Turkey" were repatriated in accordance with agreements between the two countries.⁷⁸

Whereas the Soviet Union never practiced mass repatriation with refugees of its own races except in accordance with agreements with the border states, to Armenians who had never been Russian citizens the U.S.S.R. offered a mass asylum. A number of reasons may be given for this change in general policy: First, the Armenians had never been involved in anti-revolutionary activities and generally belonged to the proletariat, not the bourgeoisie. Second, in connection with the mass repatriation to Erivan the Nansen Office had drafted a project of land reclamation in Soviet Armenia, which the Soviet Government was willing to carry out and for which money was to be raised by the High Commission.⁷⁹ Third, it would seem that the U.S.S.R. was encouraging Soviet Armenia to become the national homeland

⁷³ League of Nations, ILO, Report on the Work for the Refugees 9 (1925).

⁷⁴ Nansen International Office for Refugees, Report of the Governing Body for the Year Ending June 30, 1935, p. 5.

⁷⁵ *Ibid.* for the Year Ending June 30, 1936, p. 9.

⁷⁶ League of Nations Doc.A.27.1936.XII, Sept. 7, 1936, p. 6.

⁷⁷ J. H. Simpson, *op. cit.* 38, Table VI. ⁷⁸ J. Degras, *op. cit.*, I, pp. 263-267.

⁷⁹ Though the project failed and had to be abandoned in 1929, it must have been an additional incentive to the Soviet Government.

for Armenians, and to have it so regarded by the world at large, and in this it greatly succeeded. This repatriation, like all the other schemes to return refugees to the U.S.S.R., was hampered by the economic difficulties within the Soviet Union,⁸⁰ but nevertheless achieved a mass character which the other projects lacked.

Prisoners of War

In early Soviet treaties and agreements, by the term "prisoners of war" were covered not only Russians captured by the Central Powers in the course of World War I, but also members of the Red Army captured by the Allies during the intervention and by the border states and the irregular German units of von der Goltz during the Estonian, Latvian, Lithuanian, Finnish and Polish struggles for independence from the R.S.F.S.R. The treaties concluded by the Soviet Union with various countries for the exchange of prisoners of war, on the basis of free individual consent to be returned, were noteworthy in that the Soviet Union generally did not at that time insist on the applicability of the rules of the Hague Conventions providing for the automatic and compulsory return of prisoners of war after the close of hostilities and the re-establishment of peace.⁸¹ A few of the treaties departed from the general rule in that the clause on the free consent of the repatriates was omitted⁸² and the Agreement with Hungary on Repatriation of War Prisoners of July 28, 1921, was unusual in that it made a distinction between enlisted men (proletarians) and officers (bourgeoisie), and only provided for the return of the former to the Soviet Union.

Apart from these minor variations, the most important single aspect of these conventions and agreements is the fact that in the early years the U.S.S.R. did not apply the provisions of the Hague Conventions. This might perhaps be explained by the fact that in those days Soviet legal theory held that states and law were in a period of transition, on their way to withering away, and, moreover, that international law, being the creation of a bourgeois period, was not binding on the Soviet Union.⁸³

II. ATTITUDE OF THE SOVIET UNION TOWARDS RUSSIAN REFUGEES AND DISPLACED PERSONS ABROAD, 1939-1956

In 1939 a new phase started in the foreign relations of the Soviet Union: its expansion, the recovery of former Russian territories and the acquisition of new ones. Also involved in this expansion was the recovery of former Russian subjects, both those who had created new independent na-

⁸⁰ On influence of economic conditions on repatriation, see above, p. 339.

⁸¹ For list of treaties, see T. A. Taracouzio, *op. cit.* 112, note 80. Texts of treaties may be found in *Sbornik dogovorov*, 1921, I-II, and in 2nd rev. ed., 1928, I-II.

⁸² In the agreements with Hungary, May 21, 1920; with Turkey, March 16, 1921; with Estonia, Aug. 19, 1920.

⁸³ The first and best exponent of this thesis is the Soviet jurist, E. A. Korovin, *Mezhdunarodnoe Pravo Perekhodnogo Vremeni* (International Law of the Period of Transition) (2nd ed., Moscow, 1924).

tionalities, such as the Balts and the Poles, and those who remained stateless and resided in the countries bordering on the U.S.S.R.⁸⁴

Internal Measures

Thus, in 1940, 9,000 Russians residing in Lithuania in the region of Suwalki and Memel, which was annexed by Germany in July, 1940, at the time of the incorporation of the Baltic states into the U.S.S.R., were transferred to the Soviet Union by virtue of a Russo-German agreement on exchanges of population.⁸⁵

Prior to that, in September, 1939, with the entry of the Red Army into Eastern Poland and its incorporation into the Ukrainian and White Russian Soviet Socialist Republics following a plebiscite, Soviet citizenship was automatically granted to all citizens of Western Ukraine and West White Ruthenia who were in these territories on November 1 and 2, 1939, according to a decree of the Presidium of the Supreme Soviet of the U.S.S.R. of November 29, 1939, and by virtue of a law of August 19, 1938.⁸⁶ In connection with this it is interesting to note that the Polish-Soviet Agreement, signed at London, July 30, 1941,⁸⁷ recognized as invalid all Soviet-German treaties of 1939 as to territorial changes in Poland, and it must be presumed that the *status quo ante* was re-established. However, by a note of December 1, 1941, the Narkomindel clarified the Soviet position by stating that the U.S.S.R. recognized as Polish citizens only those persons living on the territory which had been incorporated by the Soviet Union, who were not of Ukrainian, White Ruthenian and Jewish nationality. Polish nationality had not been returned to former Russian refugees in Eastern Poland.⁸⁸

A number of former refugees and expatriates of Russian and Ukrainian nationality were also returned to the fold when the U.S.S.R. re-occupied and re-incorporated Bessarabia and North Bukovina in June, 1940. In Manchuria in 1940 the Soviet Union offered its citizenship with full amnesty to the "White Russian" émigrés residing there, but on the condition of their willingness to return.⁸⁹

At the close of World War II, due to the practice of mass deportation

⁸⁴ In 1930 it was estimated that there were 11,210-16,422 Russian refugees in Estonia; 9,808-30,000 in Latvia; 5,000-8,000 in Lithuania; 50,000-100,000 in Poland. Since their status had been stabilized for a number of years, it may be presumed that no great decline occurred during the next nine years.

⁸⁵ Robert Ginesy, *La Seconde Guerre Mondiale et les Déplacements de Populations* 40 (Paris, 1948).

⁸⁶ Ann Su Cardwell, *Poland and Russia* 132 (New York, 1944).

⁸⁷ For text of the Agreement, see B. Montanus, *Polish-Soviet Relations in the Light of International Law*, Appendix, Doc. No. 4, p. 54 (New York, 1944).

⁸⁸ For text of note, see A. S. Cardwell, *op. cit.* 132.

⁸⁹ On the legal status of former Russians residing as stateless persons in the Baltic states, see decree of Sept. 7, 1940, concerning the acquisition of Soviet citizenship by nationals of the Lithuanian, Latvian and Estonian S.S.R.s, *Sbornik dogovorov*, 1955, X, pp. 232-233. For the somewhat ambiguous provisions relating to the status of stateless former Russians in Bessarabia and N. Bukovina, see decree of March 8, 1941, *ibid.* 234.

and also to mass voluntary displacements of populations escaping from military hostilities, racial policies and changes of political regimes, the problem of refugees was further complicated by that of displaced persons. Generally speaking, prior to World War II, a refugee was a person who voluntarily fled from persecution in his home country, thus making himself *de facto* stateless by severing ties with, and allegiance to, his home state. However, during the second World War a great number of persons were deported from their homes compulsorily, and great numbers left their homes to escape the enemy occupation, with no intention of repudiating their own government. These could not properly be considered refugees in the traditional sense or stateless persons *stricto sensu*. Deportations for economic reasons, *i.e.*, to provide labor forces in industry and agriculture, carried out by the Axis in the U.S.S.R. resulted in three million Russians becoming displaced persons in Germany and Austria, not counting various minority groups and refugees both from the Germans and the Soviets.

Apart from the question of the World War II refugees and displaced persons, which will be treated later, a number of international measures were taken by the Soviet Union to aid the return of pre-1939 refugees to its citizenship.

Shortly after the end of the war the Government of the U.S.S.R. began to put pressure upon the Russian émigrés to apply for restoration of Soviet nationality, of which most of them had been deprived earlier by legislative action. A certain number were induced to do so, though it is not known how many.⁹⁰

By decrees of November 10, 1945, and January 22, 1946, the Soviet Government authorized the Russian émigrés residing in the territory of Manchuria who were formerly subjects of the Russian Empire or possessed Soviet nationality on November 7, 1917, to acquire Soviet nationality by simple declaration, no repatriation clause being attached.⁹¹ Faced under the Soviet occupation of Manchuria with a choice between a Soviet and Chinese passport, many émigrés chose the former. An identical option was extended to Russian refugees living in the Province of Sinzian, at Shanghai and at Tien-Tsin (decree of January 20, 1946).

Similar decrees were issued to cover Russian émigrés residing in France, Yugoslavia and Bulgaria (decree of June 14, 1946), in Japan (decree of September 26, 1946), and in Czechoslovakia (decree of October 5, 1946).⁹² In Yugoslavia at the end of the war there remained 8,000 former Russian nationals, some stateless and some who had obtained Yugoslav nationality under the Monarchy. The law of July 1, 1946, deprived the latter of their new nationality and, encouraged by the attitude of the Belgrade Government, many former Russians took up Soviet citizenship. In France Rus-

⁹⁰ J. Vernant, *op. cit.* 55.

⁹¹ For the text of the decree of Nov. 10, 1945, see *Vneshnyaya Politika Sovetskogo Soyuz, 1945, Dokumenty i Materialy* (Foreign Policy of the Soviet Union, 1945, Documents and Materials) (hereafter cited as VPSS) 139-140 (Moscow, 1949); also *Sbornik dogovorov*, 1956, XII, p. 193.

⁹² United Nations, *A Study of Statelessness* 164. For texts see *Sbornik dogovorov*, 1956, XII, pp. 194-197.

sian refugees came within the scope of the decree of June 14, 1946, which authorized "persons who were on 7 November 1917 subjects of the former Russian Empire, and persons who possessed Soviet nationality and who are now living in French territory, and the children of such persons" to acquire Soviet nationality. The number of those who relinquished their Nansen status and accepted the Soviet passport has been estimated as between 3,500 and 8,000. An estimated 2,000 of those who took Soviet nationality actually went back to the U.S.S.R.

Two facts must be noted about these decrees: one, that no clause as to the necessity to return to the U.S.S.R. was appended to these decrees, even though it is understood that any person accepting Soviet citizenship is always subject to recall, especially for the purpose of satisfying military service obligations; two, that in many Western European countries where certain Russian refugees had, in the flush of victory and Allied co-operation, consented to exchange their statelessness for Soviet nationality, with the outbreak of the "Cold War" many repented of their decision, broke off relations with the U.S.S.R. and again claimed international protection.

During 1946-1947, the Government of the U.S.S.R., with the backing of certain Armenian organizations abroad, launched a campaign for the repatriation of Armenians to Soviet Armenia. A decree of October 19, 1946, conferred Soviet nationality on persons of Armenian origin repatriated to Soviet Armenia.⁹³ Though, like the prewar repatriation, this emigration did not involve, strictly speaking, a return home, for the Armenians affected had never been Russian nationals, the prewar Soviet efforts to establish Soviet Armenia as an Armenian homeland were proven to have been successful, since between 60,000 and 80,000 Armenians went to the U.S.S.R. during 1946 and 1947.⁹⁴ An additional 30,000 Armenians from Turkey who had registered for emigration to Soviet Armenia were not allowed to leave the country.

It must be noted that these unilateral internal decrees of the Soviet Union after World War II affected only a special category of persons, *i.e.*, individuals who had left Russia or the U.S.S.R. prior to the second World War. This explains why the Soviet Union, in its internal measures against refugees and émigrés, did not in the postwar period insist on repatriation. These well-knit, well-assimilated minorities of Russians, with allegiance to the U.S.S.R., represented for the Soviet Union a valuable asset abroad.⁹⁵ This is evidenced by the fact that when in 1949, after the break with the Cominform, the Yugoslav Government proposed to the Soviet Government

⁹³ For text see *Sbornik dogovorov*, 1956, XII, p. 198; *Vedomosti Verkhovnogo Soveta SSSR*, 1946, No. 39.

⁹⁴ J. Vernant, *op. cit.* 57. He gives the following breakdown: 10,000-20,000 from the Lebanon; 10,000 from Syria; 15,000-20,000 from Greece; 5,000 from Egypt; 3,000-3,500 from France, and a few thousand others from Bulgaria, Rumania and Iran. Some of these repatriates were refugees; others were nationals of the countries from which they came.

⁹⁵ The same policy has been adopted by Poland in its latest drive on Polish refugees; see "Emigré Go Home," *News From Behind the Iron Curtain*, Oct., 1955, No. 10, pp. 7-8.

the repatriation of all Soviet nationals, including Russian stateless persons and Russian-naturalized Yugoslavs, it was unsuccessful and proceeded to expel all these individuals. In fact the passports issued to these Soviet nationals did not even authorize their return to the Soviet Union.

Foreign Policy

Such, however, was not the Soviet attitude, expressed in numerous international agreements, towards refugees and displaced persons created by the second World War. During the war the U.S.S.R. had participated for the first time in an international relief organization for refugees, being a member of the Executive Committee of the Intergovernmental Committee for Refugees formed at the Evian Conference of July 6, 1938.⁹⁶ Also during the war the Soviet Union had concluded a number of agreements on refugees and displaced persons, such as the Agreements of February 11, 1945, with the United Kingdom and the United States, and June 29, 1945, with France. Repatriation was the express cornerstone of Soviet legal theory concerning this category of persons:

The position of the Soviet Union and the countries of the people's democracies on the question of refugees and displaced persons is dictated by the desire of these countries to speedily return to their homes these persons artificially torn away from them, giving them an opportunity to choose independently on the question of returning home.⁹⁷

Despite the fact that the agreements concluded between the U.S.S.R. and France, Great Britain and the United States did not contain any provisions for forcible repatriation, it appears that not all the Soviet citizens repatriated under them went back to the U.S.S.R. voluntarily.⁹⁸ In 1947 it was estimated that "since the end of hostilities, the armies of occupation have been able to return to their homes some 7,000,000"⁹⁹ refugees and displaced persons; the Chief of the Soviet Repatriation Mission stated that up to September 1, 1945, 5,115,709 Soviet citizens were repatriated, of whom 2,888,157 were returned by the Red Army and 2,229,552 transferred by the Allies.¹⁰⁰ The number of remaining Russians in exile steadily decreased and between July 1, 1947, and December 31, 1951, an additional 1,800 Soviet citizens were repatriated to the Soviet Union.

Though the Soviet Union agreed that repatriation was to be decided upon

⁹⁶ R. Ginesy, *op. cit.* 131; see also E. Estorick, "The Evian Conference and the Intergovernmental Committee," *The Annals*, May, 1939, pp. 136-142.

⁹⁷ *Akademiya Nauk SSSR, op. cit.* 249.

⁹⁸ See Y. Naumenko, *Sbornik Materialov o Vydache Kazakov v Lientse i Drugikh Mestakh* 1945 (Collection of Documents on the Surrender of Cossacks in Linz and Other Places in 1945), Vols. 7, 8 and 9 (Orangeburg, N. Y., 1954-1955).

⁹⁹ The Displaced Persons Problem. A Collection of Recent Official Statements (U. S. Dept. of State Pub. 2899, Aug., 1947), "Legislation Advocated for Entrance of Displaced Persons to the United States—Message of the President to the Congress, July 7, 1947," p. 1.

¹⁰⁰ Major General Golikov, "O khode repatriatsii sovetskikh grazhdan" (On the process of repatriation of Soviet citizens), *VPSS* 1945, p. 15; *Occupation of Germany, Policy and Progress, 1945-1946* (U. S. Dept. of State Pub. 2783, Washington, 1947), p. 26, states that by October, 1945, 5½ million persons had been repatriated from the three Western zones.

freely by the refugees and displaced persons, it also insisted that they were "victims of fascist regimes"¹⁰¹ and eager to return home.¹⁰² In the West the general interpretation had been that

the Soviet viewpoint is that those persons born in areas now subject to the Soviet Governmental authority are Russian subjects and under obligation to return to such territory. They demand that we forcibly repatriate the DP's.¹⁰³

And it is true that some of the Soviet actions seem to bear out this opinion. Thus, on June 15, 1946, the Soviet Union held up the repatriation of Swiss nationals to Switzerland until such time as the Swiss Government should guarantee the return of all Soviet citizens from its territory.¹⁰⁴ On October 1, 1945, the Soviet Government announced the completion of the repatriation of all Soviet citizens from Switzerland, 9,603 individuals, and resumed the return of Swiss nationals home.¹⁰⁵

A somewhat similar incident occurred in connection with the repatriation of Soviet citizens from Belgium. On March 13, 1945, an agreement was concluded between the U.S.S.R. and Belgium to facilitate and coordinate the repatriation of Belgian and Russian citizens to their homeland.¹⁰⁶ By February 27, 1946, Belgium had repatriated 16,194 Soviet nationals, all those who had been in camps in the country. However, a number of Russians remained privately domiciled and the Soviet Ambassador to Belgium protested that the Belgian authorities did not take sufficient measures to locate these persons and insure their return, and that, at the same time, the Belgian Government rejected the request of the Soviet Union to let its Repatriation Commission officials search for and locate these individuals. The U.S.S.R. also protested the actions of the Belgian authorities who often jailed Soviet citizens for illegal residence within the country instead of handing them over to the Soviet authorities.¹⁰⁷

Some of the treaties concluded between the U.S.S.R. and its neighbors contained provisions for the return of refugees and transfers of citizens. The Armistice Agreements with Germany's former allies provided for the repatriation of Soviet displaced persons and refugees. Thus, for example, "the Estonians, Ingrians and East Karelians who had fled to Finland had

¹⁰¹ Akademiya Nauk SSSR, *op. cit.* 246.

¹⁰² A. Y. Vishinsky, "O mezhdunarodnoi organizatsii po delam bezhentsev" (On the subject of an international organization on refugees), Speech at the Session of the 3rd Committee of the General Assembly, Nov. 6, 1946, *Voprosy Mezhdunarodnogo Prava i Mezhdunarodnoi Politiki* (Questions of International Law and International Politics) 117 (Moscow, 1949).

¹⁰³ The Displaced Persons Problem, *op. cit.*, "Concern Expressed on Resettlement of Displaced Persons—Statement by the Secretary of State, July 16, 1947," p. 4.

¹⁰⁴ Akademiya Nauk SSSR, *op. cit.* 249, note 2.

¹⁰⁵ "O repatriatsii sovetskikh grazhdan iz Shveitsarii" (On the repatriation of Soviet citizens from Switzerland), VPSS 1945, p. 73.

¹⁰⁶ For text of treaty, see M. P. Herremans, *Personnes Déplacées*, Annex 11, pp. 304–307 (Brussels, 1948).

¹⁰⁷ "Zayavlenie Sovetskogo Posla v Belgii o repatriatsii Belgiiskikh grazhdan iz SSSR i Sovetskikh grazhdan iz Belgii" (Declaration of the Soviet Envoy to Belgium on the repatriation of Belgian citizens from the USSR and Soviet citizens from Belgium), VPSS 1946, pp. 94–98 (Moscow, 1952).

to be delivered to the Russians.”¹⁰⁸ On September 9, 1944, an agreement was signed between Poland and the Ukrainian S.S.R. providing for the evacuation and return of Poles from the Ukraine to Poland and of persons of Ukrainian origin from Poland to the Ukrainian S.S.R.¹⁰⁹ On May 6, 1947, a protocol was signed between the contracting parties, announcing the fulfillment of the terms of the agreement.¹¹⁰ An agreement signed on July 6, 1945, between the U.S.S.R. and Poland laid down the rules for the transfer to the U.S.S.R. of persons of Russian, Ukrainian, Byelorussian, Ruthenian and Lithuanian origin who possessed Polish nationality prior to September 17, 1939, and the transfer to Poland of persons of Polish and Jewish ethnic origin living in Soviet territory. By this agreement the U.S.S.R. recognized the Polish nationality of persons of Jewish origin, which the note of the Narkomindel of December 1, 1941, claimed as Soviet citizens. In return for this concession, the Polish Government recognized the claim of the Soviet Union, made in that note,¹¹¹ in regard to the Soviet citizenship of the other non-Polish elements formerly nationals of Russia. There were clauses on free choice or option.

In connection with the Treaty of June 29, 1945, ceding the Transcarpathian Ukraine to the U.S.S.R., a protocol signed on the same day provided for the right of persons of Ukrainian, Russian and White Russian ethnic groups residing in Czechoslovakia in the area of Slovakia to opt for Soviet citizenship with the permission of the Soviet Government, and of persons of Czech and Slovak groups residing on the territory of the Transcarpathian Ukraine (Province of Volyniya) to opt for citizenship of the Czechoslovak Republic with the permission of the Czechoslovak Government. Option was to be followed by repatriation within 12 months and was based on free choice.¹¹²

In addition to bilateral treaties concerning refugees and displaced persons, the U.S.S.R. also participated in the creation of the International Refugee Organization. In drafting the Charter of the I.R.O., the Soviets played a modest rôle, limiting themselves to insisting on the inclusion of a few particular provisions such as:

- (1) recognition that the main purpose of the United Nations was to aid the refugee in returning home;

¹⁰⁸ Axel de Gadolin, *The Solution of the Karelian Refugee Problem in Finland* 13 (The Hague, 1952).

¹⁰⁹ A similar agreement was signed between the Byelorussian S.S.R. and Poland on the same day for exchanges of their respective nationals. See V. I. Lisovsky, *Mezhdunarodnoe Pravo* (International Law) 102 (Kiev, 1955).

¹¹⁰ “Kommunike Pravitelstva Ukrainskoi SSR i Pravitelstva Polskoi Respubliki” (Communiqué of the Governments of the UkSSR and the Polish Republic), VPSS 1947, I, pp. 383-384 (Moscow, 1952).

¹¹¹ See note 88 above.

¹¹² “Podpisanie Soglasheniya mezhdru Pravitelstvom SSSR i Pravitelstvom Chekhoslovakii ob optatsii i pereselenii” (Signature of the Agreement between the Governments of the USSR and Czechoslovakia on Option and Resettlement), VPSS 1946, p. 149. For text of treaty and protocol, see *Sbornik dogovorov*, 1955, XI, pp. 31-34. A decree of Oct. 31, 1946, automatically extended Soviet citizenship to the repatriates to the U.S.S.R. See *Sbornik dogovorov*, 1956, XII, p. 198.

- (2) resettlement of those who did not want to return only with the permission of the state whose citizens they were;
- (3) banning of all propaganda against the United Nations and against repatriation in refugee camps;
- (4) inclusion among the administrative personnel of the camps primarily citizens of those states to whose nationality the inmates belonged;
- (5) aid to various states in measures for repatriation;
- (6) recognition that traitors, Quislings, war criminals and persons who had in any way collaborated with the enemies of the United Nations were not refugees eligible for protection, but should be immediately returned to their countries.¹¹⁸

Of all these points advanced by the Soviet representative, only a few were incorporated in the I.R.O. Charter. Thus the Charter recognized that

as regards displaced persons, the main task to be performed is to encourage and assist in every possible way their early return to their country of origin.¹¹⁴

Annex I to the Charter also stated that

no international assistance should be given to traitors, quislings and war criminals, and nothing should be done to prevent in any way their surrender and punishment.¹¹⁵

International help to states' projects for repatriation was also endorsed. The other amendments, however, were rejected,¹¹⁶ and the U.S.S.R. voted against the adoption of the Charter.

It is of interest to note that the U.S.S.R. also permitted the Charter of the I.R.O. to include as refugees eligible for its assistance and protection persons who had been regarded as refugees prior to 1939. Thus the remnants of the Russian émigrés of the Revolution and the Civil War came under this provision. However, since most of them had been repatriated in 1945 to the Soviet Union,¹¹⁷ and the others were disqualified from I.R.O. help because they had collaborated with the Germans and their allies, the Soviet concession was not in fact very significant.

At present Soviet legal theory insists that France,¹¹⁸ Great Britain and

¹¹³ "Proekt rezolutsii po voprosu o bezhentsakh, predlozhennyi Delegatsiei SSSR v 3m Komitete" (Draft resolution on the question of refugees proposed by the Soviet Delegation in the 3rd Committee), Feb. 4, 1946, VPSS 1946, pp. 227-232.

¹¹⁴ See Charter and Annexes to the Charter of the International Refugee Organization in "IRO," 24 Brit. Year Bk. of Int. Law 480-493 (1947).

¹¹⁵ *Ibid.* 489.

¹¹⁶ "Vystupleniya A. Y. Vyshinskogo na plenarnykh zasedaniyakh Generalnoi Asamblei pri obsuzhdenii rezolutsii po voprosu o bezhentsakh" (A. Y. Vishinsky's speeches at the plenary sessions of the General Assembly during the debate on the resolution on the question of refugees), Feb. 12, 1946, VPSS 1946, pp. 227-232.

¹¹⁷ Cf. The Displaced Persons Problem, "Statement by the Secretary of State, July 16, 1947," pp. 3-4: "For the most part, they [the repatriates] were western Europeans—French, Belgian, Dutch—and citizens of prewar Russia." (Italics supplied.)

¹¹⁸ "K voprosu o presledovanii sovetskikh grazhdan i repatriantov vo Frantsii" and "Nota sovetskogo pravitelstva frantsuskomu pravitelstvu" (On the question of the

the United States have violated the provisions of their wartime repatriation agreements with the U.S.S.R. The United States and Great Britain are accused of detaining 247,000 Soviet citizens in West Germany and Austria.¹¹⁹ The Soviet Union repeatedly professes not to want forcible repatriation of refugees,¹²⁰ but at the same time declares that the refusal of Soviet refugees and displaced persons to return is due solely to: (1) Fascist propaganda against repatriation disseminated in the camps by war criminals and traitors, and activities of Fascist organizations in the camps;¹²¹ (2) pressure put on the refugees to prevent them from choosing to return;¹²² (3) desire of the Western states to use the refugees and displaced persons as cheap labor.¹²³ In other words, according to the U.S.S.R., the displaced persons and refugees of Soviet citizenship desire to return to their homeland, but cannot because

it is obvious that . . . the displaced persons in the camps, finding themselves in a position of having absolutely no legal rights and in extremely difficult material conditions, cannot freely express their desires to return home.¹²⁴

Since the Charter of the I.R.O. bars protection and aid to "persons who have become leaders of movements hostile to the Government of their country being a Member of the United Nations or sponsors of movements encouraging refugees to not return to their country of origin,"¹²⁵ the Soviet position is legally strong, if in fact the refusal to come home is due to hostile propaganda and not to individual opposition.

Another argument advanced to advocate the transfer of the émigrés to Russian authorities is based on the principle of the compulsory surrender of war criminals. The argument is used in a variety of ways. As applied to individual leaders of the emigration movement, it consists in the U.S.S.R. demanding their return to the Soviet Union for trial as war criminals. Since the U.S.S.R. affirms that "at the present time exist international

persecution of Soviet citizens and repatriates in France, and Note of the Soviet Government to the French Government), Dec. 8 and 9, 1947, VPSS 1947, II, pp. 95-101.

¹¹⁹ "O nevyopolnenii soglasenii o repatriatsii sovetskikh grazhdan" (On the non-fulfillment of agreements on the repatriation of Soviet citizens), Feb. 24, 1949, VPSS 1949, pp. 80-84.

¹²⁰ "Vystupleniya A. Y. Vyshinskogo" (Speech of A. Y. Vishinsky), Feb. 12, 1946, VPSS 1946, p. 227.

¹²¹ "Zayavleniye A. Y. Vyshinskogo na Moskovskoi sessii Soveta Ministrov Inostrannykh Del pri obsuzhdenii voprosa o peremeshchennykh litsakh" (Declaration of A. Y. Vishinsky at the Moscow Session of the Council of Foreign Ministers at the debate on the question of displaced persons), March 15, 1947, VPSS 1947, I, p. 407.

¹²² "Vystupleniye V. A. Zorina na zasedanii tretiego komiteta Generalnoi Asamblei" (Speech of V. A. Zorin at the session of the 3rd Committee of the General Assembly), Nov. 4, 1947, Delegatsii SSSR, USSR and BSSR na Vtoroi Sessii Generalnoi Asamblei Organizatsii Obiedinennykh Natsii (Delegations of the USSR, UkSSR and BSSR at the 2nd session of the General Assembly of the United Nations Organization) 539-540 (Moscow, 1948).

¹²³ A. Y. Vishinsky, *op. cit.* (note 102) 119.

¹²⁴ "Vystupleniya A. Y. Vyshinskogo" (Speech of A. Y. Vishinsky), March 15, 1947, VPSS 1947, I, p. 408.

¹²⁵ "IRO," *loc. cit.*

criminal norms binding on all nations, such as the obligation to surrender fascist criminals,"¹²⁶ it demands the return of these émigrés as war criminals, insisting that

under the mask of "political dissidents" hide many leaders of fascist bands, who loyally served their German masters, and destroyed peaceful Soviet populations.¹²⁷

Moreover, according to the U.S.S.R., the rules of international law as established by the Charter and the Judgment of the International Military Tribunal at Nuremberg do not require that any evidence be presented along with the demand for the surrender of a war criminal, other than his name and the *locus* of his crime,¹²⁸ and the Soviet Union demands the immediate surrender of these persons who are "criminals, traitors—not refugees."¹²⁹ In addition, the Soviet argument runs, the refusal to return is only further evidence to support its contention that these "dissidents" are war criminals, else why should they refuse?¹³⁰ Therefore the repatriation of the rank-and-file is demanded because their refusal to come home is due entirely to the falsehood and terrorism to which they are subjected; the surrender of the leaders is demanded because they are war criminals and traitors.

In November, 1946, resettlement of refugees in countries other than their own was rejected by the Soviet Union.¹³¹ In December of the same year limited resettlement was accepted in principle, but only as a secondary and extraordinary measure, and only with the permission of the émigré's country of origin. The opposition to resettlement was formulated on humanitarian and legal grounds. In the first place, it was objected, such a resettlement "destines the refugees to a joyless life far from their homeland, in circumstances of all sorts of discrimination."¹³² In the second place, it leaves them open to merciless economic exploitation.¹³³ Therefore, the U.S.S.R. insists, they must be returned "home, to their families, to work in the place of their birth, to normal conditions of life."¹³⁴

The Soviet legal objections to resettlement center on the argument that it

¹²⁶ M. D. Shargorodsky, "Nekotorye voprosy mezhdunarodnogo ugovnogo prava" (Some questions of international criminal law), *Sovetskoe Gosudarstvo i Pravo* (hereafter cited as SGP), 1948, No. 3, p. 30.

¹²⁷ "Vystuplenie A. A. Gromyko na plenarnom zasedanii Generalnoi Assembledi Organizatsii Obedinennykh Natsii pri obsuzhdenii voprosa o bezhentsakh i peremeshchennykh litsakh" (Declarations of A. A. Gromyko at the plenary session of the General Assembly of the United Nations at the discussion of the question of refugees and displaced persons), Dec. 15, 1946, VPSS 1946, p. 536.

¹²⁸ "O vydache voennykh prestupnikov. Vystuplenie A. Y. Vyshinskogo na plenarnom zasedanii Generalnoi Assembledi" (On the surrender of War Criminals. A. Y. Vishinsky's speech at the plenary session of the General Assembly), Oct. 31, 1947, VPSS 1947, II, p. 166.

¹²⁹ A. Y. Vishinsky, *op. cit.* (note 102 above) 113.

¹³⁰ M. P. Herremans, *op. cit.* 231.

¹³¹ A. Y. Vishinsky, *op. cit.* 118-119.

¹³² "Vystuplenie A. A. Gromyko" (A. A. Gromyko's Speech), Dec. 15, 1946, VPSS 1946, p. 531.

¹³³ Akademiya Nauk SSSR, *op. cit.* 248 and note 3 *ibid.*

¹³⁴ A. Y. Vishinsky, *op. cit.* 117.

helps the escape of war criminals from justice, who, returned home, would quickly be discovered and punished.¹³⁵ Since the U.S.S.R. claims that the Allies have assumed an obligation before the world to punish all war criminals, even if they have to seek them at the very ends of the world,¹³⁶ any measures, such as resettlement, thwarting or tending to thwart this punishment are unacceptable to the Soviet Government.

Another point advanced by the Soviet Union is the fact that the refugees and displaced persons are not stateless, but are regarded by the Soviet Government as citizens of the U.S.S.R. regardless of any documents to the contrary.¹³⁷ Voluntary and unilateral expatriation is not recognized by the U.S.S.R. Proceeding on the basis that all rights are created by public law, the Soviet Union insists that the will of the state must be taken into account and that without the government's permission no individual renunciation of citizenship is valid.¹³⁸ Notwithstanding the fact that the refugees and displaced persons by their deeds have actually repudiated their allegiance to the U.S.S.R. and have made themselves *de facto* stateless under general international law, the U.S.S.R. continues to count them as Soviet citizens, under its diplomatic protection and bearing obligations towards the Soviet Government.¹³⁹ In this spirit, in September, 1947, the Soviet Government handed a note to the Foreign Ministry of Turkey, in which the Soviet Union demanded that the transfer of displaced persons of Moslem faith—Soviet citizens—from Italy and the Western Zone of Germany to Turkey be stopped, and declared that no resettlement of Soviet citizens from amongst the displaced persons would be considered as legal without the Soviet Union's prior consent to it.¹⁴⁰

The situation of the displaced persons and refugees from the U.S.S.R. after World War II has a number of peculiar features. Whereas the position of the Russian émigrés after 1917 was worsened by the Soviet Government's decision to denaturalize them, the refugees and displaced persons after 1945 are hindered by the U.S.S.R.'s insistence that they remain Soviet nationals, making their resettlement and absorption more difficult; moreover, whereas the great majority of pre-World War II émigrés finally found a new home, most of the Soviet exiles after World War II were returned in the early postwar years. In international relations the present Soviet attitude is significant in that it makes possible a future trial by the U.S.S.R. of any person guilty of crimes against refugees or displaced persons claimed by it as its citizens, in accordance with the

¹³⁵ "Vystuplenie A. A. Gromyko" (A. A. Gromyko's Speech), Dec. 15, 1946, VPSS 1946, p. 535.

¹³⁶ "O vydache voennykh prestupnikov" (On the surrender of war criminals), Oct. 31, 1947, VPSS 1947, II, p. 166.

¹³⁷ "Zayavlenie A. Y. Vyshinskogo" (A. Y. Vishinsky's Declaration), March 15, 1947, VPSS 1947, I, p. 408.

¹³⁸ Cf. J.-Y. Calvez, *Droit International et Souveraineté et U.R.S.S.* 175 (Paris, 1953); "C'est sans doute par cette conception qu'il faut expliquer l'insistance dont a fait preuve l'Union Soviétique pour exiger le rapatriement des exilés volontaires après la deuxième guerre mondiale: le lien rattachant les personnes à l'Etat serait uniquement un lien de droit public et objectif, ne dépendant que de la volonté de l'Etat."

¹³⁹ *Akademiya Nauk SSSR, op. cit.* 218. ¹⁴⁰ *Ibid.* 249.

Soviet interpretation of international law and the principles of Nuremberg. In view of the Soviet insistence that the exiles are nationals and thereby protected by the Soviet Criminal Code, any individual criminal act¹⁴¹ or act of genocide¹⁴² against refugees and stateless persons from the Soviet Union is within the jurisdiction of Soviet law, especially under the new Soviet trend to legislate domestic punishments for international crimes such as crimes against humanity, genocide, etc.¹⁴³

In analyzing the composition and status of the refugee and displaced persons' movement from the U.S.S.R. three factors stand out. The first is that the Soviet refugee problem is similar to all previous refugee problems, *i.e.*, it is a problem of minorities, ethnic and cultural.¹⁴⁴ On September 4, 1945, there were only 62,000 displaced persons of Soviet Russian origin in Western Germany.¹⁴⁵ The great majority of those who refused to return to their homes came "from the northern Baltic areas, Poland, the Russian Ukraine, and Yugoslavia."¹⁴⁶ On December 31, 1946, it was estimated that of the displaced persons in the American Zone of Germany only about 20,000 were Soviet citizens, as compared to about 155,000 Balts.¹⁴⁷ On June 4, 1947, it was stated that "about 17 percent of the displaced persons are Balts, 30 percent Poles, 7 percent Yugoslavs, 20 percent Jewish, and the remainder primarily Ukrainians, Russians and stateless."¹⁴⁸ Moreover, of those regarded as Soviet Russians, *i.e.*, primarily those coming from the R.S.F.S.R., a great majority belonged to various small ethnic minorities, Crimeans, Caucasians, Kalmuks, Kabardines, few being Great Russians. Of Soviet citizens in general, an overwhelming majority of the refugees and displaced persons were of Ukrainian and White Russian origin.

The second conclusion that one arrives at concerns persons among the refugees who collaborated with the enemy. The percentage was high,¹⁴⁹

¹⁴¹ N. N. Poliansky, *Mezhdunarodnoe Pravosudie i Prestupniki Voyny* (International Justice and War Criminals) 73 (Moscow, 1945).

¹⁴² V. M. Chkhikvadze, *op. cit.* 133.

¹⁴³ S. Volodin, "Konventsia o preduprezhdenii prestupleniya genotsida i nakazanii za ego" (Convention for the Prevention and Punishment of Genocide), SGP, 1954, No. 7, pp. 125-129. For example, see *Zakon o zashchite mira* (Law for the Defense of Peace), March 12, 1951, *Vedomosti Verkhovnogo Soveta SSSR*, No. 5, 1951. Genocide and racial discrimination have long been subjects of Soviet legislation, the first measure appearing as a Decree of the Council of People's Commissars of the R.S.F.S.R., July 27, 1918; see *Akademiya Nauk SSSR, Institut Prava, Sovetskoe Gosudarstvennoe Pravo* (Soviet Public Law) 168 and note 1 *ibid.* (Moscow, 1948).

¹⁴⁴ Cf. J. S. Roucek, "Minorities—A Basis of the Refugee Problem," *The Annals*, May, 1939, p. 15, where he considers the Soviet minority problem to be "political and religious."

¹⁴⁵ J. Vernant, *op. cit.* 84.

¹⁴⁶ *The Displaced Persons Problem*, p. 1.

¹⁴⁷ *Occupation of Germany* (Dept. of State Pub. 2783) p. 27.

¹⁴⁸ *The Displaced Persons Problem*, "Position on Resettlement of Displaced Persons—Statement by Assistant Secretary Hilldring, June 4, 1947," p. 8.

¹⁴⁹ According to George Fischer, *Soviet Opposition to Stalin* 45 (Cambridge, Mass., 1952): "Before the end of the war, ex-Soviet citizens serving in the Wehrmacht totaled at least half a million." German sources estimated the number at a million. At the end of the war there was an estimated 5-5½ million Soviet refugees and DP's.

and again it was especially high among minorities.¹⁵⁰ Ukrainians, White Russians, Balts and some of the smaller ethnic groups seem to have collaborated voluntarily and extensively with the Germans and their allies. Collaboration took the form of participation in S.S. units, regular army units incorporated in the German armies, independent armies such as R.O.A., K.O.N.R. and the "Cossack" units, para-military and irregular organizations. The number of Great Russians who collaborated seems to have been relatively small,¹⁵¹ and was mainly composed of prisoners of war "who had been driven by hunger to enlist."¹⁵²

The final point relates to the present juridical status of the Balts, who form about 17 percent of the displaced persons and refugees. According to the U.S.S.R. they are Soviet citizens ever since the incorporation of the Baltic states into the Soviet Union, and it demands their return to the fatherland. Thus, by the provisions of the Armistice with Finland, Estonians who had fled to Finland had to be returned to the U.S.S.R. However, after the end of the war the United States and Great Britain announced that they refused to recognize the annexation of the Baltic states by the U.S.S.R. and continued to maintain diplomatic relations with Latvian, Estonian and Lithuanian governments-in-exile. No Balts were returned by the United States or Great Britain to the Soviet Union, and they are recognized by countries following the American and British example as continuing to be citizens of their respective states. Other states, which recognized the Soviet claim, regard them as *de facto* stateless. The U.S.S.R., whose claim is recognized by the other Soviet bloc countries, continues to consider them as Soviet citizens, owing it allegiance and subject to its diplomatic protection. A large percentage of the Balt refugees and displaced persons collaborated with the Germans during the war.

With the beginning of the "cold war" and the growing hostility between East and West it soon became obvious that the Charter of the I.R.O. was not adequate in view of the circumstances. Aid and protection were soon being granted to elements among refugees and displaced persons who had collaborated with the Germans against the Soviet Union, even those guilty of atrocities and war crimes. Moreover, the Charter provided only for persons who had become refugees and displaced persons prior to its ratification. The number of refugees, however, continued to grow, with escapees from the Red Army in East Germany providing the bulk of Russians escaping from Soviet control, and with large numbers of persons escaping from the Soviet satellites. Aid and protection were granted to them too, in spite of the fact that it was not foreseen by the

¹⁵⁰ See G. Fischer, *op. cit.* 48 and 51, for names of units created from Soviet minorities.

¹⁵¹ Though Fischer, *op. cit.* 160, does suggest that "approximately 50 percent each of Great Russians and various categories of non-Russians" formed the "national composition of Vlasov's small KONR Army," that army itself did not include all Soviet refugees and DP's. Most of the minorities were organized into separate units, independent of the Vlasov movement.

¹⁵² J. Vernant, *op. cit.* 84; G. Fischer, *op. cit.* 44; and B. Dvinov, *Vlasovskoe Dvizhenie v svete Dokumentov* (The Vlasov Movement in the Light of Documents) 34 (New York, 1950).

Charter. Thus, little by little, the provisions of the Charter of the I.R.O. were either modified or disregarded. Then, with the coming to an end of the International Refugee Organization, the General Assembly of the United Nations decided at its fourth session in 1949 to set up a new body to continue I.R.O.'s work. The Statute of the United Nations High Commissioner's Office for Refugees was approved on December 14, 1950. Finally on July 28, 1951, a new Convention Relating to the Status of Refugees¹⁵³ was concluded which extended the I.R.O. Charter's provisions to include all persons fleeing from persecution due to events which took place in their country prior to January 1, 1951, thus effectively covering escapees from behind the Iron Curtain. It was hailed in the West as a true charter of the political refugee.¹⁵⁴ Since the High Commissioner's Office, unlike the agencies which preceded it, is not competent to carry out repatriation, and since the Convention of July 28, 1951, provides only for legal protection and material aid, neither of them is recognized by the U.S.S.R.

The Soviet Union took no part in drafting or signing the new convention. Though it had voted against the Charter of the I.R.O., and had considered it as merely a temporary agency, the U.S.S.R. now seems to consider that organization's Charter as a codification of the international law on refugees and displaced persons, and the only valid international legal code on the subject. Thus, in 1951 it was still being written in words identical or similar to those of the I.R.O. Charter that the cause of the existence of refugees and displaced persons was Fascism:

The policy of terror applied in the past and still practiced in States of fascist regimes in regard to progressive elements, the racial politics of fascist Governments led to the situation where, even prior to World War II, a large number of refugees and displaced persons came into existence.¹⁵⁵

Moreover, even at the present time in Soviet teachings of international law, refugees and displaced persons are defined as persons "victims of Nazi and Fascist regimes, or regimes which took part in the second World War on the side of Fascist regimes (Quisling and similar regimes)." ¹⁵⁶ Thus the U.S.S.R. seems to have adopted the law of the I.R.O. Charter as the final word on refugees and displaced persons, even though it had opposed its adoption. At the same time, the viewpoint taken by the Soviet Union permits it: (1) to brand as Fascist or Nazi any regime which causes some of its citizens to flee as refugees or displaced persons (thus Tito in 1949, when he expelled Soviet nationals and Yugoslavs of Russian origin; the United States, when it caused Gerhardt Eisler to flee); (2) to insist that since only Fascist and Nazi states can cause honest citizens to escape from them, and since by definition the U.S.S.R. is not a Fascist or Nazi, but a

¹⁵³ For an analysis of the provisions of the convention, see P. Weis, "Legal Aspects of the Convention of 28 July 1951 Relating to the Status of Refugees," 30 Brit. Year Bk. of Int. Law 479 (1953); see also *idem*, "The International Protection of Refugees," 48 A.J.I.L. 193 (1954).

¹⁵⁴ Georges Langrod, "La Charte du Réfugié Politique," *Revue Politique et Parlementaire*, March, 1955, No. 646, pp. 276-286.

¹⁵⁵ *Akademiyā Nauk SSSR, op. cit.* 246. ¹⁵⁶ *Ibid.* 247.

socialist state, *ergo* those who flee from it are not genuine political refugees, but diversionists, spies, adventurers, saboteurs, traitors, and common criminals.

The Soviet Union regards the problem of refugees and displaced persons as crucial. "The question of refugees is a question of great international importance, both by its scope, and by its nature";¹⁵⁷ and complications in its solution "poison the international atmosphere";¹⁵⁸ in other words, a continued failure to solve the problem presents a threat to world peace and security. According to the Soviet Union, the Charter of the United Nations

laid on the Great Powers the leading responsibility for the maintenance of international peace and security, and obliged them to adopt their resolutions on such questions unanimously.¹⁵⁹

Since Soviet legal theory also claims that

discrepancy between right and duty under international agreements would be a violation of the principle of the sovereign equality of States and the violation of universally recognized and accepted principles of international law which confirm the just principle that right must correspond to duty, and *vice versa*, to an obligation must correspond a right,¹⁶⁰

the U.S.S.R. insists that all measures in international law and relations taken in the interests of peace and security must include the signature of the Soviet Union (and the other great Powers), or be invalid as norms of general international law. Therefore the U.S.S.R. claims that the Convention of 1951, which it does not recognize, does not create international law at all, but only represents a multilateral treaty, binding only on its signatories. "Legislation" by a number of states for all the members of the international community is rejected by the Soviet Union as violating the principle of sovereignty,¹⁶¹ unless the legislating is done unanimously in the interest of peace and security by the "Big Five," who derive their powers and privileged position from the United Nations Charter. Thus, ignoring the provisions of the 1951 Convention, the U.S.S.R. indorses the provisions and definitions of the Charter of the I.R.O. as true international legal rules, which have not been superseded by the more recent agreements.

Since there is no more organized co-operation between East and West on the solution of the refugee and displaced persons problem within the framework of an international agency, all Soviet measures now take the form either of internal legislation, or of agreements with its satellites, or of bilateral agreements with other states. Repatriation still remains the keynote

¹⁵⁷ A. Y. Vishinsky, *op. cit.* 118.

¹⁵⁸ "Vystuplenie A. A. Gromyko" (A. A. Gromyko's Speech), Dec. 15, 1946, VPSS 1946, p. 534.

¹⁵⁹ S. V. Molodtsov, "Pravilo edinoglasniya postoyannykh chlenov Soveta Bezopasnosti — nezbyblemayaya osnova OON" (The Rule of Unanimity of the Permanent Members of the Security Council is the Unshakeable Basis of the UNO), SGP, 1953, No. 7, p. 48.

¹⁶⁰ *Ibid.*

¹⁶¹ See E. A. Korovin, *Mezhdunarodnoe Pravo na Sovremennom Etape* (International Law at the Contemporary Stage) 12-13 (Moscow, 1946).

of all Soviet policy, the latest expression of which is the setting up in East Berlin of a "Committee for a Return to the Motherland" for Soviet escapees. Claiming to be a group of penitent refugees who, with the co-operation of the East German Government, are leading a voluntary movement for repatriation to the Soviet Union, the Committee issues a propaganda newspaper published in Russian, Lithuanian, Latvian and Ukrainian. Three of its members represent the Soviet Baltic Republics; copies of the paper are mailed to Baltic exiles in Europe and the United States;¹⁶² and, in general, emphasis is laid on appealing to exiles of Baltic origin.¹⁶³ The redefection drive seems to be aimed not so much at achieving mass repatriation as at demoralizing and disorganizing the émigré movement by such defections within its ranks as do take place,¹⁶⁴ even though some concrete results have been achieved, too, in terms of returnees home, the numbers being variously estimated as between "several hundred refugees"¹⁶⁵ and more than a thousand.¹⁶⁶ This campaign reflects the present policy of the Soviet Union towards refugees and displaced persons.

Prisoners of War

The problem of Soviet prisoners of war was to a great extent confused with the general question of refugees and displaced persons. In the first great repatriation movements at the close of the war, prisoners of war were returned along with civilians, no particular distinction being made between the two. When repatriation ceased and refugees and displaced persons who refused to return were classified as political refugees and granted asylum, prisoners of war who remained among them availed themselves of the same right. The Soviet Union has not made separate representations for the return of Soviet prisoners of war, but has included them in the general category of Soviet citizens, refugees and displaced persons whose return it demands. The provisions of the Hague Conventions relative to the repatriation of war prisoners were not invoked by the Soviet Union on behalf of its own prisoners of war after World War II.

A number of reasons for this exist: (1) the fact already mentioned that prisoners of war were generally included in the category of refugees and displaced persons; (2) the fact that most prisoners of war were returned in 1945 and 1946; (3) many of the prisoners of war captured by the Germans

¹⁶² "Emigré Go Home," News From Behind the Iron Curtain, Oct., 1955, No. 10, p. 5; also A. Gaev, "Return to the Motherland," 2 Bulletin of the Institute for the Study of the History and Culture of the USSR 20-24 (1955, No. 8).

¹⁶³ "Soviet Appeals to Estonians Here," New York Times, Feb. 9, 1956.

¹⁶⁴ "Emigré Go Home," *loc. cit.* 9.

¹⁶⁵ *Ibid.*

¹⁶⁶ "Russian Combats Refugee Flights by Intensive 'Come Home' Drive," New York Times, March 28, 1956, estimates the number of returnees in the 13 months that ended Jan. 31, 1956, at 1,158; see also "812 Leave Argentina for Soviet in Growing Repatriation Exodus," *ibid.*, June 2, 1956, in which it is stated that, besides the 812, 780 had sailed already, 800 more were scheduled to sail within a month, and before the end of the year 30,000 persons from Paraguay, Uruguay and Argentina were expected to return behind the Iron Curtain.

and their allies, especially those of Ukrainian, White Russian and Caucasian origin, voluntarily co-operated with the German authorities, even to the extent of taking part in military hostilities against the Soviet Union (leading anti-guerilla bands, joining the ranks of para-military and S.S. units), thus coming within the category, not of war prisoners, but of traitors and war criminals.

In spite of this lack of clear distinction between the civilian and military repatriates, their status is markedly different in Soviet law. Under Article 58(1a) of the Soviet Criminal Code, escape and flight across the border in the case of a civilian is treason punishable by the firing squad, with confiscation of all property, unless there are attenuating circumstances, in which case the penalty is 10 years in prison and confiscation of all property. Under Article 58(1b) the same crime committed by a service man automatically entails the firing squad, the usual confiscation of property and possible reprisals against his family and comrades in arms.¹⁶⁷ In Soviet military law, any soldier who surrenders without being wounded or without having received an order from his superior to lay down his arms is guilty of treason and liable to prosecution under military criminal laws. A number of Soviet soldiers, finding their position hopeless, surrendered without having been wounded, sometimes with, sometimes without, orders from their superiors. However, in Soviet military law, even an order of a superior is not sufficient excuse and does not always grant immunity. *Respondeat superior* in the Soviet military forces is not a plea sufficient to establish innocence, for

a subordinate carrying out an obviously criminal order of his superior commits in fact a socially dangerous crime against the interests of the Armed Forces.¹⁶⁸

Thus officers who gave orders to surrender are technically, under Soviet military criminal laws, traitors and criminals, and the enlisted men who obeyed their orders are not protected by the plea of *respondeat superior*.¹⁶⁹ In theory, though it was not done in practice, a demand could have been presented by the U.S.S.R. for the return of its prisoners of war as criminals, not as refugees or displaced persons or *bona fide* prisoners of war.

The Soviet attitude towards the repatriation of military prisoners which was not specifically expressed in connection with members of its own armed forces, was expounded on the subject of the Chinese prisoners of war in Korea, and, in substance, boils down to two rules: (1) "the ruling principle of international law and international practice is the unconditional, unreserved and total exchange of prisoners of war";¹⁷⁰ (2) it is

¹⁶⁷ Ministerstvo Yustitsii RSFSR, Uголовnyi Kodeks RSFSR (Ministry of Justice of the RSFSR, Criminal Code of the RSFSR) 17-18 (Moscow, 1953).

¹⁶⁸ V. M. Chkhikvadze, *op. cit.* 199.

¹⁶⁹ The position of the subordinate is made even more difficult by the fact that in Soviet military law he has no right to question the validity or utility of his superior's orders. See V. M. Chkhikvadze, *op. cit.* 198.

¹⁷⁰ E. Petrov, "Amerikanskii imperialisty—zlostnye narushiteli rezhima voennogo plena" (American Imperialists are Flagrant Violators of the Regime for P.O.W.'s), SGP, 1952, No. 12, p. 56; see also H. Brandweiner, "Amerikanskoe tolkovanie mezhdunarodnogo prava" (American Interpretation of International Law), SGP, 1954,

obvious that the "attempt to enroll as politically active elements, eligible for the right of asylum for political reasons, persons whose activities had no political motivations, and who are motivated solely by reasons having nothing to do with politics, must be rejected as completely unjustified."¹⁷¹ In other words, compulsory and early repatriation of all prisoners of war is the rule, since the "conditions of being a prisoner of war are not a favorable circumstance for a free choice and a free decision. . . ." ¹⁷² At the present time the U.S.S.R. has reversed the position it had taken after World War I on the return of prisoners of war, namely, that it was to be based on free consent,¹⁷³ and on this point, as on the rest of its legal attitude towards refugees and displaced persons, the Soviet Union seems to be in disagreement with the newer concepts of international law.¹⁷⁴

Nevertheless, the policies of the U.S.S.R. on refugees, displaced persons and prisoners of war, from 1917 to 1956 include a number of bold innovations in law, of which some were later adopted by other states (Germany and Italy practiced denaturalization of their citizens), some became international legal norms (free consent of prisoners of war to repatriation), most of which at the present time are the model for the policies of the satellites, who have adopted the pattern of mass denaturalizations, selective amnesties and repatriation. It must be concluded that the U.S.S.R. considers its experience in handling the problem of refugees and displaced persons as having been successful, since the satellites have taken it for their own.¹⁷⁵

No. 6, p. 46: "This Convention [the Hague Convention of 1907] acts at present universally as an expression of customary law of war binding on all nations."

¹⁷¹ A. Y. Vishinsky, Speech at the General Assembly of the United Nations, quoted in *Pravda*, Nov. 12, 1952.

¹⁷² A. Y. Vishinsky, "Koreiskii Vopros" (The Korean Question), Oct. 29, 1952, *Voprosy Mezhdunarodnogo Prava i Mezhdunarodnoi Politiki* (Questions of International Law and International Politics), Seventh Session of the General Assembly of the United Nations, 1952, p. 72 (Moscow, 1953).

¹⁷³ See P. I. Kudriavtsev *et al.*, *Yuridicheski Slovar* (Legal Dictionary), II, "Repatriatsiya" (Repatriation), pp. 334-335 (Moscow, 1956).

¹⁷⁴ Cf. R. R. Baxter, "Asylum to Prisoners of War," 30 *Brit. Year Bk. of Int. Law* 489 (1953): "The principle that a Detaining Power may, if it desires, grant asylum to prisoners of war who do not wish to be repatriated now appears to be generally accepted." See also Ch. De Visscher, *op. cit.* 235.

¹⁷⁵ Witness, for example, the sequence of actions taken by the Hungarian Government on the subject of the post-revolt refugees: Under Art. 17(2) of Nationality Act LX of Dec. 24, 1948, the Government, on a proposal made by the Minister of the Interior, may deprive of his Hungarian nationality a person who "on going abroad contravenes or evades the statutory provisions relating to departure from the country." On Nov. 29, 1956, an amnesty for Hungarian citizens who left the country illegally was made public. A few weeks later it was announced that a census of the population was planned soon, presumably to determine the presence or absence of registered residents, prior to the taking of measures against the illegal absentees. Under the provisions of the same Nationality Act, Art. 17(3), the property of the persons deprived of Hungarian citizenship for illegal exit is subject to confiscation. Diplomatic pressure was exerted on Austria to help return Hungarian youngsters "tricked by Fascist propaganda" into leaving their motherland, and 141 refugees were returned to Hungary from Yugoslavia, presumably voluntarily. See *New York Times*, Dec. 10, 1956, and *East Europe*, Jan., 1957, Vol. 6, No. 1, pp. 21-22, 43.

LEGAL TERMINOLOGY FOR THE UPPER REGIONS OF THE ATMOSPHERE AND FOR THE SPACE BEYOND THE ATMOSPHERE

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There are no established definitions in law for describing the upper regions of the atmosphere or the space beyond the atmosphere. The legal dictionaries and the law encyclopedias do not even refer to the *stratosphere* or the areas above. The author of a recent article on the problems of high altitude jurisdiction thus declares:

Terminology presents some problems. Space, outer space, and even airspace to some extent are often used interchangeably although each may have different scientific, legal, and ordinary meanings.¹

The urgency of the need for a standard terminology in law for describing the upper regions of the atmosphere (and the areas beyond) arises from the fact that there is a variety of man-made objects which will soon be operating at high altitudes—some outside the atmosphere—and these can be expected to present somewhat different legal problems depending upon the heights and speeds at which they fly.²

Astronautical jurisprudence is a new field of law, and it raises some basic questions which must soon be answered, namely: What, in law, is meant by the term "airspace?" What are the scientific divisions of the upper regions of the earth's atmosphere? How does "space" differ from "outer space," "world space," "territorial space," "contiguous space," "terrestrial space," etc.?

WHAT IS "AIRSPACE?"

There has never been a satisfactory definition in law of the term "airspace"—the word is frequently used in domestic decisions involving disputes between landowners and aviators³ and in international conventions

¹ H. B. Jacobini, "Problems of High Altitude or Space Jurisdiction," 6 Western Political Quarterly 681, note 5 (1953). For recent articles on law and activities in the upper regions of the atmosphere (and beyond), see John C. Hogan, "Space Law Bibliography," 23 Journal of Air Law and Commerce 317-325 (1956).

² The Journal of Space Flight has published a list showing model, type, and flight characteristics of twenty-five different high-altitude vehicles which the Soviet Union has under development. These include a satellite vehicle, an intercontinental ballistic missile, a medium-range ballistic missile, a supersonic glide missile, a guided aircraft rocket, several manned rocket planes, etc. A comparable development in this technology also exists in the United States. See Alfred J. Zaehring, "Table of Soviet Missiles," 8 Journal of Space Flight 1-4 (1956).

³ See the recent Canadian case, *Lacroix v. the Queen*, 4 D. L. R. 470-478 (1954).

governing the rights of nations to fly over one another's territory⁴—probably because there has never been a systematic attempt by judges or lawyers to think out the legal position of the “airspace” in relation to the upper regions of the atmosphere. According to Sir (now Lord) Arnold Duncan McNair,

anyone who seeks to make this attempt now that it has become of immediate importance to do so is driven to search for scraps in many different fields. . . . Across his path is continually cast the pale shadow of the *cujus est solum* maxim, which, like most maxims and slogans, has merely been used either to darken counsel or to afford a short cut and an excuse for not thinking the matter out upon a basis of principles.⁵

As long as the areas at any appreciable height above the surface of the earth were incapable of being reached by man, the term “airspace” could be used loosely in law by judges, lawyers, and others, unaware of the technical problems involved at extreme altitudes, to refer to the right of the landowner to all of the area above his land *ad infinitum* and in the sense of the *ad coelum* maxim. But from the time that the atmosphere has first been used for flight, there has been a noticeable tendency in law to grant aviators a right in the “airspace” above land.⁶ In the domestic law of the United States, and elsewhere, various theories have been advanced for this purpose,⁷ and these have been described as “attempts to strike a balance between the property interests of the landowner and the demands of a growing industry.”⁸ In international law, also, academic theories have been proposed which would limit state sovereignty in the atmosphere,⁹ but none of these has ever been adjudicated by an international tribunal, and the vast majority of states have adopted the doctrine of complete and exclusive sovereignty over the “airspace” above their territories.¹⁰ But

⁴ The term is used but not defined in Art. 1, Paris Convention of 1919, and in Art. 1, Chicago Convention of 1944. Cf. Shawcross and Beaumont on Air Law 175 (London, 1951). See also Eugène Pépin, *The Legal Status of the Airspace in the Light of Progress in Aviation and Astronautics* (Pub. No. 2, Institute of International Air Law, McGill University, Montreal, 1957), p. 3.

⁵ Arnold Duncan McNair, *The Law of the Air* 297 (2nd ed. by Michael R. E. Kerr and Robert A. MacCrindle, London, 1953). See John C. Cooper, “Roman Law and the Maxim *Cujus Est Solum* in International Law,” 1 McGill Law Journal 23–65 (1952–1955).

⁶ By decree of Nov. 15, 1921, Peru proclaimed freedom of aviation at an altitude above 3,000 metres. Oppikofer, in 1930, observed that “Peru constitutes an exception. . . . This is a last survival of Fauchille's liberal theories. . . .” See *Enquiries into the Economic, Administrative, and Legal Situation of International Air Navigation* (League of Nations, 1930), No. C, 339, M-139 (1930), VIII, p. 112. Peru has now ratified the Chicago Convention of 1944.

⁷ See Henry G. Hotchkiss, *A Treatise on Aviation Law* 20–34 (New York, 1938).

⁸ William L. Prosser, *Handbook of the Law of Torts* 87–88 (St. Paul, 1941).

⁹ Shawcross and Beaumont, *op. cit.* 173–174. See also Wienczyslaw Wagner, *Les Libertés de l'Air* 27–42 (Paris, 1948).

¹⁰ Ch. I, Art. 1, Convention on Civil Aviation, in *Proceedings of the International Civil Aviation Conference, Chicago, Illinois, November 1 to December 7, 1944*, Vol. I, p. 147 (Washington, 1948).

here too, the tendency to limit is seen in express treaty provisions which grant reciprocal rights to fly over one another's territory.¹¹

Article 1 of the Chicago Convention of 1944 provides that every state has "complete and exclusive sovereignty over the airspace above its territory," but the term "airspace" is nowhere defined in the convention.¹² Shawcross and Beaumont declare:

An English lawyer might argue that "complete" and "exclusive" are tautologous. But it is submitted that an international tribunal would interpret "complete" as meaning "without limit," and that therefore there is no limit of height. . . . It is submitted that, whatever the answer might be, it would not be based on an interpretation of the article which gave to the words "over the airspace" the meaning of "above the airspace." The position under the Convention should be carefully contrasted with the Federal Law of the USA, in which "Navigable Airspace" is declared free for commercial navigation by all US citizens.¹³

This subject was discussed at the 1956 Annual Meeting of the American Society of International Law, where Professor John Cobb Cooper presented a paper on the "Legal Problems of Upper Space."¹⁴ Professor Cooper observed that

The Chicago Convention contains no definition of "airspace" but it may well be argued that, as it was adapted from the Paris Convention, it deals with no areas of space other than those parts of the atmosphere where the gaseous air is sufficiently dense to support balloons and airplanes.¹⁵

He pointed out that both the Paris and Chicago conventions deal with objects which derive their support in the atmosphere from reactions in the air, such as balloons and airplanes, and not with rockets, satellites, and other such "spacecraft" designed to move through space without atmospheric support. And he added:

Nothing in the Chicago Convention precludes the possibility of state sovereignty being extended by international agreement, or by unilateral force, above the areas in which the airplane and balloon can be used, but there is certainly no basis on which any customary international law can as yet be considered applicable to such higher areas.¹⁶

¹¹ But see McNair, *op. cit.* 8, who says that "the fact that most States are willing to exchange a mutual right to entry and passage no more derogates from the principle of national sovereignty than does the admission of foreign ships to purely national waters by the Barcelona Convention of 1921 upon navigable waterways of international concern." Cf. state control over marginal seas and territorial waters: S. Whittemore Boggs, "National Claims in Adjacent Seas," 61 *Geographical Review* 185-209 (April, 1951).

¹² See note 10 above.

¹³ Shawcross and Beaumont, *op. cit.* 175, discussing "What is Airspace?". The U. S. Civil Aeronautics Act of 1938 defines "navigable airspace" as that airspace above the minimum altitudes of flight prescribed by regulations under the Act. See Sec. 1 (24) of the Act, as amended, 49 U.S.C. 401.

¹⁴ Proceedings of the American Society of International Law, Fiftieth Annual Meeting, Washington, D. C., April 25-28, 1956, pp. 85-93.

¹⁵ *Ibid.*, p. 88.

¹⁶ *Ibid.*, p. 89. A positive step towards the formulation of standard legal definitions

In the discussion period which followed Professor Cooper's address, Mr. P. K. Roy, Director of the Legal Bureau of the International Civil Aviation Organization, said that

If one were to construe the expression "airspace," one might first inquire as to the understanding which existed as to airspace among the delegates at Chicago who drew up this Convention. Failing any evidence . . . one would have to fall back upon the ordinary dictionary or scientific meaning of the word airspace, and in that instance you would find it to extend to a height of 60,000 miles above the surface of the globe. If that is to govern, I think it is practically useless to discuss anything further on the subject.¹⁷

Miss H. Alberta Colclaser, of the State Department, remarked that when rockets (*i.e.*, "spacecraft") are launched they must go through airspace during the first part of their operation, and she added:

Regardless of whether we consider that "airspace" may have been in the minds of the framers of the Chicago Convention as a concept governed by its physical properties, or as having a certain limit measured by distance from the earth, the rockets and satellites will be launched through that airspace for some time to come, I believe.¹⁸

Professor Myres S. McDougal, of the Yale University Law School, observed that we are not likely to have a new convention on this subject any time soon, and he added:

I think I would go further and agree that the Chicago Convention is largely irrelevant. By any standard of interpretation of that convention, one is pretty quickly thrown back on the major purposes of the framers, and hence on the level . . . of security, of encouragement of scientific development, of commercial purposes, etc. In clarifying such fundamental community policies the vague and inadequate words of the convention would be relatively meaningless.

for the upper regions of the atmosphere and beyond is reported to have been taken at the Tenth Assembly of the International Civil Aviation Organization meeting at Caracas. Professor Cooper, in a document made available to all members of ICAO, tentatively suggested the adoption of a new convention which would have as its purposes: (1) to reaffirm the Chicago Convention of 1944 giving the subjacent state full sovereignty in areas of the atmospheric space above it, up to heights where "aircraft," as now defined, may be operated; such areas being designated "territorial space"; (2) to extend the sovereignty of the subjacent state upward to 300 miles above the earth's surface, designating this second region as "contiguous space"; and to provide for a right of transit through this zone for all non-military devices, when ascending or descending; (3) to accept the principle that all space above "contiguous space" is free for the passage of all such mechanical contrivances (London Times, June 29, 1956). This proposal, which was first disclosed by Professor Cooper in his address before the 1956 Annual Meeting of the American Society of International Law, introduces two new terms—"territorial space" and "contiguous space"—both of which refer to regions of the atmosphere, and it uses the term "space" to refer to all areas beyond 300 miles above the surface of the earth, *i.e.*, the uppermost region of the *exosphere* and *solar* and *galactic* space.

¹⁷ 1956 Proceedings of the American Society of International Law 94.

¹⁸ *Ibid.* 101.

So what one is thrown back on is customary international law. Here I think I would disagree with Mr. Cooper and would suggest that there is a great deal which is quite relevant. . . .¹⁹

Alec Mellor, in France, observes that "all property which the hand reaches not, is but a dream," and concerning the question of "airspace" in the Chicago Convention of 1944, he says:

It [the question] was settled without any limit in altitude to the sovereignty of the states, sovereignty which was foreseen only territorially or, if one prefers, horizontally, article 2 [*sic*] of the Chicago Convention aiming only at terrestrial regions and territorial waters adjacent to them.²⁰

C. E. S. Horsford, in England, refers to the Paris Convention of 1919 and to the "five freedoms" of the Chicago Convention of 1944 and declares:

. . . it will be seen at once that these regulations are not only inadequate but largely inapplicable to the new and vast medium into which our studies must be directed . . . all operations in space will be conducted so far above what is now accepted as the airspace above a nation's territory, and so impossible will it be to observe any limitations of a territorial nature such as frontiers demand, that it is in the law of the sea that the answer would seem to lie.²¹

Alex Meyer, in Germany, apparently would define "airspace" in terms of the atmosphere, for he says:

In contrast to the atmosphere, which for legal and political reasons is covered by the sovereignty of the individual nations so far as it is situated above such national territories, outer space as a whole must be considered as being a free territory.²²

And he adds that the space traveler would not be subject to normal air law, although he would be subject to a general legal obligation not to endanger other traffic or persons.

Nicolas Mateesco, in an article published in Canada in 1952, declares that the term "airspace" should be abandoned and replaced by the term "*milieu aérien*." Mateesco proposes:

The abandonment of the expression "air space," [an] inadequate [concept] in the legal sphere, and its replacement by the expression "*air milieu*," a concept which represents substantially and on the phenomenological plane a material body and in the judicial sphere a common good (*res omnium communis*).

¹⁹ *Ibid.* 108. Cf. *idem*, "Artificial Satellites: A Modest Proposal," 51 A.J.I.L. 74-77 (1957).

²⁰ Alec Mellor, "L'Astronautique et le Droit," 18 *Revue générale de l'Air* 402-403 (1955).

²¹ C. E. S. Horsford, "The Law of Space," 14 *Journal of the British Interplanetary Society* 145 (1955). The principal argument advanced for projecting state sovereignty "all-the-way-up" has been national security. Even if this were physically possible, there is probably a point in *solar space* where militarism from above, against the land surfaces of the earth, ceases to be of any significance.

²² Alex Meyer, "Legal Problems in Space-Flight," *Annual Report of the British Interplanetary Society* 353 (1952). See also *idem*, "Rechtliche Probleme des Weltraumflugs," 2 *Zeitschrift für Luftrecht* 31-43 (1953).

And he adds:

The "*air milieu*" is *res communis*, and [at] the present stage of [scientific] invention, the atmosphere constitutes this "*milieu*" in the [same] fashion that the sea constitutes the "*milieu*" of maritime navigation. The "*air milieu*" remains, therefore, a common good for the use of all [people].²³

Article I of the Air Code of the U.S.S.R., approved by the Central Executive Committee of the Council of People's Commissars of the USSR on August 7, 1935, states: "To the Union of Soviet Socialist Republics belongs complete and exclusive sovereignty in the airspace above the Union of Soviet Socialist Republics."²⁴ The Code does not define the term "airspace." A 1956 article on "State Sovereignty in Airspace," written by A. Kislov and S. Krylov,²⁵ surveys briefly the history of domestic and international air legislation from the beginning of aircraft and, as examples of early Russian regulation of "airspace," the authors cite the law of July 5, 1912 (concerned with prohibited air zones) and the Order of the Council of Ministers of November 16, 1919 (concerned with the prohibition of foreign aircraft from crossing Russia's western borders). The Soviet authors declare:

. . . the ceiling question has long since been settled in international law and in international practice. As long ago as 1913, the French lawyer Clunet wrote: "The right of the sovereignty of each country to its territorial atmosphere must theoretically (it was not a practical question at the time—AUTHORS) extend *usque ad coelum* (right to the skies, that is to infinity—AUTHORS), as they used to say in olden times." Contemporary British lawyers, interpreting the expression "complete and exclusive sovereignty over airspace" point out that "complete" signifies "without limit," that is, there is "no limit of height."²⁶

The parenthetical remarks in the quotation, adding to the thoughts of Clunet on this subject, are those of the Soviet authors; they apparently felt it necessary to comment upon the phrase *usque ad coelum*, emphasizing that it signifies "to infinity."

A new dictionary, published in 1956 by the United States Air Force, defines "airspace" as follows:

Space in the air, or space above a particular surface of the earth, esp. such space considered to have a particular shape and extent for a particular purpose.²⁷

²³ Nicolas Mateesco, "A qui appartient le milieu aérien?" 12 *Revue du Barreau de la Province de Québec* 227 at 240-242 (1952). See also Ming-Min Peng, "Le vol à haute altitude et l'article 1 de la convention de Chicago, 1944," *ibid.* 277-292.

²⁴ See *Akademiia Nauk SSSR, Institut prava, Mezhdunarodnoe Pravo*, "Regime of Airspace," pp. 219-274 (Moscow, 1947); *cf. ibid.*, 1951 ed., pp. 318-321.

²⁵ A. Kislov and S. Krylov, "State Sovereignty in Airspace," *Mezhdunarodnaia Zhizn* (International Affairs), No. 3 (March, 1956), pp. 35-44. English-language version printed in Moscow.

²⁶ *Ibid.* 42-43.

²⁷ The United States Air Force Dictionary, p. 36 (ed. by Woodford Agee Hefin, Research Studies Institute, Air University, 1956).

The editor's comment on this definition declares:

Airspace is commonly defined by the outline of the geographical area below it, and is considered to extend upward indefinitely. . . .

It may be possible to clarify what has been meant in law by the term "airspace" by reference to the physical structure of the terrestrial atmosphere. It should be kept in mind that, even in modern times, when lawyers and judges have used the term "airspace," they have been thinking primarily of the *troposphere*—the lowest region of the atmosphere—where conventional aircraft operate.

REGIONS OF THE ATMOSPHERE

There are two main systems of terminology used by physical scientists to describe the different regions of the terrestrial atmosphere: one refers to variations in temperature with height, and the other to variations in electron density with height. The first of these appears to be suitable for use in law and as a background for thinking about the meaning of the term "airspace."

From the point of view of temperature variations, the atmosphere of the earth consists of five gaseous layers known as:²⁸

The Troposphere	(sea level to <i>circa</i> 10 km.)
The Stratosphere	(<i>circa</i> 10 km. to <i>circa</i> 40 km.)
The Mesosphere	(<i>circa</i> 40 km. to <i>circa</i> 80 km.)
The Thermosphere	(<i>circa</i> 80 km. to <i>circa</i> 375 km.)
The Exosphere	(<i>circa</i> 375 km. and above)

The *troposphere* is nearest the earth's surface, and the *exosphere* merges into space.

The term "upper atmosphere" also appears frequently in scientific literature, and its meaning depends largely on the context in which it is used. For the weather forecaster, the term may be understood to refer to the region known as the *stratosphere*, while for the radio physicist, it may signify those areas above the *stratosphere*.²⁹ According to G. Griminger, "the region above the stratosphere extending outward to interplanetary space may be called the upper atmosphere."³⁰ The words "middle," or "lower," for sake of brevity, are also sometimes used for referring to the different levels of the atmosphere where exact definitions and distinctions are not required.

²⁸ This nomenclature has been accepted by the Brussels committee for use in scientific works. Joseph Kaplan, "The Earth's Atmosphere," 41 *American Scientist* 49 (1953). Scientists, however, have not yet agreed on the actual upper and lower limits in the case of some of these regions, and limits based upon temperature vary with latitude, seasons, and from day to day anyway.

²⁹ Sydney Chapman, "Upper Atmospheric Nomenclature," 55 *Journal of Geophysical Research* 397 (1950).

³⁰ G. Griminger, *Analysis of Temperature, Pressure, and Density of the Atmosphere Extending to Extreme Altitudes* 2 (RAND Corp., Santa Monica, 1948).

Troposphere

Most present-day air activities take place in the *troposphere*, the lowest region of the atmosphere which extends from the surface of the earth to a height about equal to the peak of the world's highest mountain.³¹ H. K. Kallmann defines it as

the region of temperature decrease from the ground up to approximately 10 km (approximately 18 km at the equator and approximately 7 km near the poles).³²

Since it is the region nearest to the surface of the earth and where modern airliners and all piston-powered aircraft operate (generally at heights of not more than four or five miles), the significance of the *troposphere* in both domestic and international law is apparent.³³

Stratosphere

The term *stratosphere* is used to designate the atmospheric region immediately above the *troposphere*. In non-scientific usage, however, the term is sometimes applied to all areas above the *troposphere*; thus Webster's Dictionary defines the term as:

The upper portion of the atmosphere, above 11 kilometers, more or less (depending on latitude, season, and weather), in which temperature changes but little with altitude and clouds of water never form and in which there is practically no convection;—originally, and still often, called the *isothermal region*.³⁴

In scientific works, however, the term is used to signify that region of the atmosphere from about 10 kilometers to about 35 or 40 kilometers.³⁵

Man's activities in the *stratosphere* thus far have included: the highest flight by an airplane (90,000 feet);³⁶ the highest flight by a manned balloon (76,000 feet);³⁷ the highest flight by an unmanned balloon (140,000 feet); etc.³⁸

³¹ Cf. William W. Kellogg, Diagram of the Structure of the Upper Atmosphere (P-534, RAND Corp., Santa Monica, Aug. 1, 1954).

³² H. K. Kallmann, A Study of the Structure of the Ionosphere 16 (Ph.D. Dissertation, Univ. of Calif. at Los Angeles, 1955, P-638, RAND Corp., Santa Monica).

³³ In the Swetland case, the court used the terms "upper stratum" and "lower stratum" in the adjudication of a dispute between landowner and aviator arising in the *troposphere*. See Swetland *et al.* v. Curtiss Airports Corporation *et al.*, 55 F. 2d 201 (1932).

³⁴ See Webster's New International Dictionary, 2nd ed., unabridged, 1947.

³⁵ Kallmann, *op. cit.* 16.

³⁶ Capt. Iven C. Kincheloe, in a Bell X-2 rocket plane, climbed to 126,000 feet in an unofficial flight in August, 1956, at the Edwards Air Force Base in California. New York Times, Nov. 9, 1956, p. 58.

³⁷ The previous record of 72,395 feet, established in 1935, was broken on Nov. 8, 1956, when Lt. Comdrs. Malcolm D. Ross and Morton L. Lewis reached a new record altitude of 76,000 feet in a pressurized gondola attached to a helium-filled balloon. *Ibid.*, p. 1.

³⁸ See diagram of "The Earth's Atmosphere" in Joseph Kaplan, "The Earth's Atmosphere," reprinted from 41 American Scientist 49-65 (1953).

Mesosphere; Thermosphere; and Exosphere

It has been proposed by Sydney Chapman that the term *mesosphere* be assigned to the region "between the top of the stratosphere and the major minimum of temperature existing somewhat below 100 km (the exact level is still uncertain). . . ." ³⁹ H. K. Kallmann defines the top of the *mesosphere* at "around 80 km." ⁴⁰

Sydney Chapman has also proposed that the term *thermosphere* be applied to the region of steady temperature increase immediately above the *mesosphere*.⁴¹ The top of this region has been placed by M. Nicolet and P. Mange at between 375 and 500 kilometers.⁴² Man's activities in the *thermosphere* have included: the highest flight by the V-2 (114 miles), and the highest flight by rocket, the Wac Corporal (250 miles).⁴³

The term *exosphere* signifies the region from the top of the *thermosphere* to the area where the escape of molecules from the atmosphere occurs, a "region of practically constant temperature above the critical level, where the density is very low and the mean free path is very large." ⁴⁴ It is the region above *circa* 375 kilometers where collisions between particles and absorption of solar radiation are rare.

There are still many unsolved, and as yet unknown, legal and political problems connected with man's use of these upper regions of the atmosphere. Even our scientific knowledge of the physical properties of the regions, indeed, is still meager. One of the objectives of the earth satellites to be launched by the United States (and by the Soviet Union) during the 1957-1958 International Geophysical Year will be to obtain more accurate scientific data.⁴⁵

The significance in law of the upper regions of the atmosphere has been noted by Professor Cooper, who says that

. . . the rocket that reached 250 miles (400 kilometers) above the surface of the earth . . . was far past any region that could be termed "airspace." ⁴⁶

At another time, Professor Cooper refers to "the intermediate area between the upper level of the atmosphere used by aircraft and the lowest height

³⁹ Chapman, *loc. cit.* 395-396.

⁴⁰ Kallmann, *op. cit.* 17.

⁴¹ Chapman, *loc. cit.* 396.

⁴² M. Nicolet and P. Mange, An Introduction to the Study of the Physical Constitution and Chemical Composition of the High Atmosphere (Ionospheric Research Laboratory, Pennsylvania State College, Contract No. AF 19 (122)-44, April, 1952).

⁴³ See diagram of "The Earth's Atmosphere," Kaplan, *loc. cit.*, facing p. 49.

⁴⁴ Kallmann, *op. cit.* 17.

⁴⁵ See International Geophysical Year, a special report prepared by the National Academy of Sciences for the Committee on Appropriations of the United States Senate, Doc. No. 124, pp. 19-21 (U. S. Government Printing Office, Washington, D. C., 1956). See also F. J. Krieger, A Casebook on Soviet Astronautics (RM-1760, RAND Corp., June 21, 1956), which contains a discussion of Soviet interests in space, including 200 semi-technical references and 21 appendices consisting of English translations of Russian-language works on space flight.

⁴⁶ John Cobb Cooper, "High Altitude Flight and National Sovereignty," 4 International Law Quarterly 415 (1951).

at which a rocket or satellite may freely be operated," and he declares: "I am not sure that we yet have the scientific data necessary to determine the extent to which rockets or satellites may safely use this intermediate area. At least I do not feel that sufficient data is publicly available."⁴⁷

The area above 80 kilometers (which is strongly ionized and sometimes referred to as the *ionosphere*)⁴⁸ may be significant in the law of radio communication with space. Already we know that it is of fundamental importance in radio-wave propagation, since the reflection of such waves by the *ionosphere* makes long-distance communication possible.⁴⁹ Professor J. Kaplan says that "thorough knowledge of the ionosphere and its day-to-day variations must be secured if one is to use radio waves to communicate with outer space." And he adds: "Already it is certain that the very thin electrically conducting regions of the ionosphere strongly influence the future of man on this and other planets."⁵⁰

THE LIMIT OF THE ATMOSPHERE

If the term "airspace" as used in law were synonymous with the term "atmosphere" as used in science, then it might be possible to define the upper limits of "airspace" without ever having recourse to a judicial decision on this subject.⁵¹ The earth's atmosphere has no limit, but gradually grows thinner and thinner with elevation until the trace of air becomes imperceptible. Thus, scientists tell us that about one half of the entire mass of the atmosphere is below 5.8 kilometers (3.6 miles) and that 97 percent of the atmosphere is below 29 kilometers (18 miles). The peak of Mount McKinley, elevation 3.8 miles, is above more than one half of the atmosphere. The question of the height of the atmosphere, however, may be put in a more practical form, namely: To what height above the surface of the earth does a sufficient quantity of air persist to still give any indication whatever of its presence? This has been called the "sensible height" of the atmosphere.⁵²

A study made in 1948 of temperature, pressure, and density of the atmosphere at extreme altitudes has described the upper limit of the atmosphere as follows:

⁴⁷ John Cobb Cooper, "Legal Problems of Upper Space," 1956 Proceedings of the American Society of International Law 90-91.

⁴⁸ From the point of view of the variations in electron density with height, the *ionosphere* is divided into layers known as the E, F, and G layers. There is no advantage in law for adopting this further division or terminology.

⁴⁹ Grimminger, *op. cit.* 2. Cf. H. Bremmer, *Terrestrial Radio Waves* 2 (Brussels, 1949).

⁵⁰ Kaplan, *loc. cit.* 61.

⁵¹ Shawcross and Beaumont say that "Even the word 'air' has no definite meaning, and is often used where 'atmosphere' would be more apt." *Op. cit.* 17, note (a).

⁵² Milham has declared: "As a general conclusion, then, it may be stated that a sufficient quantity of air extends to a height of 300 kilometers to give us an indication of its presence. . . . The earth's atmosphere cannot extend more than 21,000 miles and turn with the earth as it rotates on its axis. At this distance centrifugal force due to the rotation and gravitational force attraction balance so that the air would be abandoned." Willis I. Milham, *Meteorology* 19-20 (New York, 1918).

A limit for the height of a planetary atmosphere may be defined in a number of different ways, each according to the concept used, and each leading to a different result. In fact, if one can imagine an isothermal atmosphere on a non-rotating planet for which there is no variation of gravity with distance, it is found . . . mathematically at least, that the atmosphere would extend to infinity. If, on the other hand, an atmosphere be maintained with an adiabatic temperature distribution, it is found that the gas must have a definite upper limit. If an isothermal atmosphere rotates as a solid with a rotating planet in which gravity obeys the inverse square law, it is found . . . that there is a limiting distance where the gravity and centrifugal forces exactly balance producing a minimum in the density distribution. For the equatorial plane this distance is found to be . . . 21,836 miles above sea level, and this value might be regarded as an indication of the order of magnitude of the limiting height of the atmosphere.⁵³ (Emphasis added.)

The chart of "The Earth's Atmosphere" in Professor Kaplan's monograph contains this statement:

Atmosphere probably continues to at least 10,000 miles, where the temperature is 4,000 degrees.⁵⁴

THE AEROPAUSE

The transitional environment between the atmosphere and space has been described by H. Strughold as follows:

. . . space is a near vacuum. . . . Furthermore, space is criss-crossed by high speed pieces of cosmic matter like meteorites that range in size from tiny dust particles to huge lumps weighing many tons. In addition, it is traversed by corpuscular and electromagnetic radiation of solar and galactic origin . . . propagation of sound waves is impossible. Thus, space is mysteriously dark and silent. Such are the circumstances found in free interplanetary space.

Active life of the kind that we know, is inconceivable in such an environment. Man and the higher animals require a relatively high air pressure and a relatively high oxygen pressure, not found in space. We are unaccustomed to the various kinds of radiation in their original form, so typical of space, such as primary cosmic rays, and unaccustomed to the meteorites. While the atmosphere provides us with life sustaining pressure conditions, on the one hand, it protects us from the ingredients of space on the other. Where these atmospheric functions cease, we leave behind us certain vitally important factors intrinsic of the earth's atmosphere, and encounter certain strange factors intrinsic of extraterrestrial space. The cessation of these functions does not take place suddenly at the border of the atmosphere, as it is astronomically defined, i.e., at an altitude of about 1,000 km (600 miles), rather it takes place in steps that begin far down in the stratosphere.⁵⁵

⁵³ Grimminger, *op. cit.* 61.

⁵⁴ Kaplan, *loc. cit.*, Chart of "The Earth's Atmosphere" facing p. 49.

⁵⁵ H. Strughold, "Space Equivalent Conditions Within the Earth's Atmosphere: Physiological Aspects," 1 *Astronautica Acta* 33-34 (1955). Wernher von Braun says that "High-altitude rockets have repeatedly risen beyond the upper fringes of the atmosphere and have shown that rockets can be propelled and guided through the vacuum

Several terms have been proposed in science for referring to the transitional environment between the atmosphere and space; these include: "aeropause," "prespace," and "pseudo-atmosphere." H. Haber, discussing manned flight at the borders of space, declares:

A functional border between atmosphere and space is defined as a level at which the atmosphere fails as a supporting medium, and space-equivalent conditions begin. . . . The use of the term "aeropause" for the border region between atmosphere and space is proposed.⁵⁶

REGIONS BEYOND THE ATMOSPHERE

A variety of terms, some scientific and others not, have been introduced in the recent "space law" literature for describing the regions beyond the atmosphere—and some of these are used in a political sense to signify *all* of the area beyond the limit of state sovereignty whether within or outside the atmosphere. The terms include: "outer space," "cosmic space," "extra-territorial space," "world space," "extra atmospheric space," "*extra territorium* space," and others.

Oscar Schachter visualizes three regions: he defines "air space in terms of the atmospheric elements necessary to 'lift' an aircraft," speaks of the exclusion of state sovereignty in "outer space," and then refers to passing from "the region of outer space to that of the Moon and other celestial bodies. . . ." ⁵⁷ H. B. Jacobini, who defines his terms, declares that the term "*extra territorium* space will be used in a strict sense to designate the area beyond the limit of national sovereignty," and he points out that the term "outer space" "though used by Schachter in the sense of *extra territorium* space would seem to be more applicable to the section of space which falls beyond the limit of the earth's attraction." ⁵⁸ E. Danier proposes 1,000 kilometers as a point of division, and describes the region below this point as the "terrestrial atmospheric stratum" and the region above as "cosmic space." ⁵⁹ According to C. Wilfred Jenks,

One could, theoretically, conceive of the atmosphere, the ionosphere, the zone used by the earth satellites and interplanetary and interstellar space beyond as a series of zones subject to differing legal regimes. There would, however, be serious difficulty in defining the boundaries of the successive zones.⁶⁰

of outer space. Even animals have been carried aloft in such flights and they are in as good a state of health today as they have ever been before." See "Statement," *ibid.* 1.

⁵⁶ H. Haber, "Manned Flight at the Borders of Space," 22 *Journal of the American Rocket Society* 269 (1952).

⁵⁷ Oscar Schachter, "Legal Aspects of Space Travel," 11 *British Interplanetary Society Journal* 14-18 (1952).

⁵⁸ H. B. Jacobini, "Problems of High Altitude or Space Jurisdiction," 6 *Western Political Quarterly* 681, note 5 (1953).

⁵⁹ E. Danier, "Les Voyages Interplanétaires et le Droit," 15 *Revue générale de l'Air* 423 (1952).

⁶⁰ C. Wilfred Jenks, "International Law and Activities in Space," 5 *International and Comparative Law Quarterly* 103 (1956).

The author points out that even if this difficulty is solved, there are still more fundamental problems to be overcome.⁶¹

The need in law for adoption of a standard terminology for referring to the upper regions of the atmosphere and the areas beyond is evident.⁶²

The following terms, based upon the nomenclature of astronomy, could be used in law for referring to the regions beyond the atmosphere:

1. Solar Space (Interplanetary Space)
2. Galactic Space (Interstellar Space)
3. Extragalactic Space

Solar Space (Interplanetary Space)

The term "solar system" is used in astronomy to refer to the sun and the several bodies which rotate around it.⁶³ These include the earth (and its satellite, the moon), and eight other known planets, including Mercury, Venus, Mars, etc., the outermost of which is Pluto, located about 3670 million miles from the sun.

The term *solar space* in law would refer to the area of the "solar system" as defined in astronomy. Areas in *solar space* which might be of special interest in law include: the "orbit of the moon," which has an average radius of about 238,000 miles; the "ecliptic," the orbit of the earth around the sun; etc.

Galactic Space (Interstellar Space)

Just as the earth and the other above-mentioned planets are a part of the planetary system of the sun, so the sun and "many thousand million other stars" are a part of the "galactic system," i.e., the system of the "Milky Way."⁶⁴ The galactic system is spiral in form, and its diameter is estimated as 100,000 light years. Baker points out that the sun is one of a multitude of stars, many of which are larger and many of which are smaller, and he declares that:

If the size of the sun is represented by one of the periods on this page, the sun's nearest neighbor among the stars, the double star Alpha

⁶¹ "The first is that any projection of territorial sovereignty into space beyond the atmosphere would be inconsistent with the basic astronomical facts. The revolution of the earth on its own axis, its rotation around the sun, and the motions of the sun and the planets through the galaxy all require that the relationship of particular sovereignties on the surface of the earth to space beyond the atmosphere is never constant for the smallest conceivable fraction of time. Such a projection into space of sovereignties based on particular areas of the earth's surface would give us a series of adjacent irregularly shaped cones with a constantly changing content. Celestial bodies would move in and out of these cones all the time. In these circumstances, the concept of a space cone of sovereignty is a meaningless and dangerous abstraction." *Ibid.* 103-104.

⁶² Mr. Karsten introduced a Bill in the House of Representatives which provided for the establishment of a "Joint Committee on Extra-terrestrial Exploration." See H. R. 7843 (Aug. 2, 1955).

⁶³ Robert H. Baker, *Astronomy* 162 (New York, 1950).

⁶⁴ *Ibid.* 460.

Centauri, would be shown on this scale by two small dots ten miles away.⁶⁵

The term *galactic space* in law would refer to the areas beyond *solar space* and would include all of the area defined in astronomy as the "galactic system." Vast spaces intervene between the stars which make up the "galactic system," and these spaces, which are not perfectly empty, but contain dust and gas, are called "interstellar space" in astronomy.

Extragalactic Space

The term *extragalactic space* in law would refer to all of the area beyond the "galactic system" as defined in astronomy.⁶⁶ This would include the many stellar assemblages beyond the "Milky Way," which astronomers tell us are scattered through space as far as the largest telescopes can now explore.⁶⁷

NOTE

Two recent developments in international affairs indicate that possible political arrangements or agreements for the international control of space vehicles are being considered: President Eisenhower in his State of the Union Message, on January 10, 1957, declared the willingness of the United States "to enter any reliable agreement which would . . . mutually control the outer space missile and satellite development."⁶⁸ Four days later, on January 14, 1957, Ambassador Henry Cabot Lodge submitted to the United Nations a new five-point disarmament program which contains the provision that renewed negotiations should strive to insure that

research and development activities concerning the propulsion of objects through outer space be devoted exclusively to scientific and peaceful purposes.

Concerning the earth satellite, intercontinental missiles, long-range unmanned weapons, and space platforms, Ambassador Lodge said:

The United States proposes that the first step toward the objective of assuring that future developments in outer space would be devoted exclusively to peaceful and scientific purposes would be to bring the testing of such objects under international inspection and participation.⁶⁹

⁶⁵ *Ibid.* 3.

⁶⁶ "Mctagalactic Space is space outside the limits of the Galaxy; Anagalactic Space, that within its limits." Arthur P. Norton, *A Star Atlas* 10 (London, 1946).

⁶⁷ Cf. George E. Hale, *Beyond the Milky Way* 69 ff. (New York, 1926).

⁶⁸ New York Times, Jan. 11, 1957, p. 10; 36 Dept. of State Bulletin 124 (1957).

⁶⁹ New York Times, Jan. 15, 1957, p. 4; 36 Dept. of State Bulletin 226, 227 (1957).

EDITORIAL COMMENT

POST-MORTEM ON THE SUEZ DEBACLE

Sir Anthony Eden resigned on January 9th as Prime Minister of Great Britain. According to a press despatch, "His health and his spirit have broken under the pressure aroused in Britain and abroad by his policy in Egypt."¹ He was appointed Prime Minister by Queen Elizabeth on April 6, 1955, after many years of service in positions of responsibility in Parliament and as Foreign Secretary under Sir Winston Churchill.

The sympathy felt for his personal disappointment was only exceeded by the shock of his resort to armed force in Egypt. When the American Society of International Law was founded fifty years ago to promote the establishment and maintenance of international relations on the basis of law and justice there were many more skeptics than believers in that aspiration. Today world opinion is overwhelmingly opposed to the use of armed force in the conduct of international affairs, certainly to the point that an offer of peaceful settlement should be made and refused before nations draw the sword in their legitimate right of self-defense.

The Charter of the United Nations is an existing criterion to judge a nation's conduct on this question. According to it, the Security Council may recommend appropriate procedures or methods of adjustment of any dispute the continuance of which is likely to endanger the maintenance of international peace and security. It is specifically provided that in making recommendations the Security Council should "take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice" (Article 36). Legal disputes are defined by the corresponding provision of the Court's Statute to include disputes concerning (a) the interpretation of a treaty, (b) any question of international law, (c) the existence of any fact which, if established, would constitute a breach of an international obligation, and (d) the nature or extent of the reparation to be made for such a breach (Article 36).

It is immaterial to this comment that any or all of the Members of the United Nations involved in the Suez Canal imbroglio have accepted the so-called Optional Clause incorporated in Article 36 of the Statute of the Court. We are content to leave that question to the semasiologists, whose debates in our opinion have not been very helpful in promoting the high purposes of the United Nations. The first paragraph of that article reads:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

The Suez Canal dispute was triggered on July 26, 1956, by the precipitate and unjustifiable act of the President of Egypt purporting to na-

¹ New York Times, Jan. 10, 1957.

tionalize the Suez Canal Company. It was an act of retaliation against the United States and Great Britain for their declination to extend financial help to Egypt to build a high dam on the Nile River at Aswan.

Those who never believed in, or who have become cool in their respect for, the rights of private property, have not directly challenged the international legality of the nationalization decree. Some have taken the position that President Nasser's surprising move in his negotiations for a foreign loan was no breach of international law because, they assert, the treatment of the company was a purely internal Egyptian matter. In the view of the writer of this comment that position is untenable. It is not a rule of international law that sovereignty confers immunity to disregard or violate international obligations. Sovereignty imposes duties as well as rights, including the exercise of good faith in the fulfillment of private contracts with governments as well as in the observance of the obligations of solemn treaties.

Every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states. . . . No community can be allowed to enjoy the benefit of national character in modern times without submitting to all the duties which that character imposes.²

It is not intended to question the right of nationalization under justifiable circumstances and conditions. The governments of France, the United Kingdom and the United States promptly and vigorously denied that President Nasser's act was of that character. Moreover, it is difficult to separate the legal issue raised by the cancellation of the concession to the company, which had been performed to Egypt's undoubted benefit for 88 of its term of 100 years, and the relevant provisions of the Convention respecting the Free Navigation of the Suez Maritime Canal signed at Constantinople on October 29, 1888, by which the Government of Egypt was bound. The fact that the convention was made in perpetuity and that the concession would terminate within twelve years is not material to the legality of the unilateral act of Egypt on July 26, 1956.

Article XII of the Convention of 1888 provides:

The High Contracting Parties, by application of the principle of equality as regards free use of the Canal, a principle which forms one of the bases of the present Treaty, agree that none of them shall seek, with respect to the Canal, territorial or commercial advantages or privileges in any international arrangements that may be concluded.

The motive of "territorial or commercial advantages or privileges" for the unilateral abrogation of the international arrangements with the Suez Canal Company is conclusively shown in President Nasser's speech announcing the so-called decree of nationalization. He asserted that: "The

² Instruction of Secretary of State Daniel Webster to the U. S. Minister to Mexico, April 15, 1842, 1 Moore, *International Law Digest* 5.

Suez Canal was built for the sake of Egypt and for its benefit. But it was a source of exploitation and the draining of wealth." He linked the nationalization of the company with the building of "a strong and dignified Egypt, the Arab Egypt," industrialized and capable of competing with those who "used to suck our blood, our rights and take them." "Citizens, today," he declared, "our wealth has been restored to us. . . . We are conscious of accomplishing glories and achieving true dignity. Sovereignty in Egypt will belong only to her sons."³

The Declaration of London of January 17, 1871, states:

It is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement.

The United States is not a party to either the Canal Concession or the Treaty of 1888, but both stipulate for the free and equal use of the Canal by all nations. Under international law that stipulation inures to the benefit of non-signatories.

The contracting parties may frame the covenants of the treaty between themselves so as to lay down an universal principle binding on them, at least, in their intercourse with the rest of the world.⁴

On the day following the publication of the Egyptian nationalization decree the United States Department of State made public an announcement in which it was said that "the seizure of the installations of the Suez Canal Company carries far-reaching implications. It affects the nations whose economies depend upon the products which move through this international waterway and the maritime countries as well as the owners of the Company itself."⁵ The United States Government accordingly began urgent consultations with the other governments concerned.

On August 2, the Governments of France, the United Kingdom and the United States issued a tripartite statement from London which contained the following paragraphs:

1. They have taken note of the recent action of the Government of Egypt whereby it attempts to nationalise and take over the assets and the responsibilities of the Universal Suez Canal Company. This Company was organised in Egypt in 1856 under a franchise to build the Suez Canal and operate it until 1968. The Universal Suez Canal Company has always had an international character in terms of its shareholders, Directors and operating personnel and in terms of its responsibility to assure the efficient functioning as an international waterway of the Suez Canal. In 1888 all the Great Powers then principally concerned with the international character of the Canal and its free, open and secure use without discrimination joined in the Treaty and Convention of Constantinople.

³ The Suez Canal Problem, July 26–September 22, 1956 (Department of State Publication 6392), pp. 25–30.

⁴ 1 Phillimore, *International Law* 46–49 (3d ed.).

⁵ Department of State Press Release No. 413, July 27, 1956.

This provided for the benefit of all the world that the international character of the Canal would be perpetuated for all time, irrespective of the expiration of the Concession of the Universal Suez Canal Company. Egypt as recently as October 1954 recognised that the Suez Canal is "a waterway economically, commercially and strategically of international importance," and renewed its determination to uphold the Convention of 1888.

2. They do not question the right of Egypt to enjoy and exercise all powers of a fully sovereign and independent nation, including the generally recognised right, under appropriate conditions, to nationalise assets, not impressed with an international interest, which are subject to its political authority. But the present action involves far more than a simple act of nationalisation. It involves the arbitrary and unilateral seizure by one nation of an international agency which has the responsibility to maintain and to operate the Suez Canal so that all the signatories to, and beneficiaries of, the Treaty of 1888 can effectively enjoy the use of an international waterway upon which the economy, commerce, and security of much of the world depends. This seizure is the more serious in its implications because it avowedly was made for the purpose of enabling the Government of Egypt to make the Canal serve the purely national purposes of the Egyptian Government, rather than the international purpose established by the Convention of 1888. Furthermore, they deplore the fact that as an incident to its seizure the Egyptian Government has had recourse to what amounts to a denial of fundamental human rights by compelling employees of the Suez Canal Company to continue to work under threat of imprisonment.

3. They consider that the action taken by the Government of Egypt, having regard to all the attendant circumstances, threatens the freedom and security of the Canal as guaranteed by the Convention of 1888. This makes it necessary that steps be taken to assure that the parties to that Convention and all other nations entitled to enjoy its benefits shall, in fact, be assured of such benefits.⁶

The steps taken pursuant to the foregoing decision were directed toward a political settlement with Egypt. The provisions of the United Nations Charter for the settlement of justiciable questions were not invoked, nor was there any other offer to submit the question to arbitration. The failure of the political negotiations resulted in Great Britain and France taking the law into their own hands by invading Egypt with military forces on October 31st. Their objective failed and they evacuated Egypt on December 22nd, in compliance with a resolution of the General Assembly of the United Nations adopted by an overwhelming vote.

President Nasser's refusal to submit to a political settlement and the failure to bring him to the bar of international justice before the principal judicial organ of the United Nations permitted him to stand before the world as an innocent party. The ill-considered policy of the governments of Great Britain and France, in resorting to force and not to legal remedies after the peaceful overtures to President Nasser were rejected, subjected them instead of Egypt to condemnation by the United Nations and the world at large. The unfavorable reaction to their choice of the sword was instant and universal, even to some extent in their own countries.

⁶ The Suez Canal Problem (Department of State Publication 6392), pp. 34-35.

Had an International Court decision been rendered unfavorable to Egypt's position, and that government had refused to abide by it, sanctions could have been applied, even with force in the background if necessary, with the support of other law-abiding nations and of their public opinion. Had the decision been in support of the position of Egypt, there would still have remained with the claimant states any political pressures or economic sanctions to which the Egyptian Government might be amenable.

The unhappy fate of Sir Anthony Eden should be a lesson to other statesmen tempted to follow a similar course. His example in defeat may serve a more constructive purpose in promoting the rule of law in international relations than would have his success in resorting to armed force.

GEORGE A. FINCH

Honorary Editor-in-Chief

EXTRATERRITORIAL APPLICATION OF UNITED STATES LEGISLATION AGAINST
RESTRICTIVE OR UNFAIR TRADE PRACTICES

For several years now legal literature in the United States has carried articles *pro* and *con* on the question whether the application of the American antitrust laws to transactions taking place wholly or partially abroad and being directed primarily toward distributive activity outside the American market, violates "international law."¹

On the same page of a recent advance sheet² the Supreme Court has dealt in sibylline fashion with certain issues involved in the debate, refusing to rehear its denial of certiorari in *Vanity Fair Mills v. T. Eaton Co., Ltd.*,³ and affirming by memorandum decision the District Court decision in *Holophane Company, Inc. v. United States*.⁴ Both cases involve the issue of the international validity of so-called "extraterritorial" application of United States legislation for the regulation of economic conduct, *i.e.*, in both cases the contention was made that "international law"⁵ would forbid the extension by the United States of its legislative authority to the conduct in issue.

Vanity Fair Mills was extensively reported in the last issue of the

¹ Haight, "International Law and Extraterritorial Application of the Anti-Trust Laws," 63 Yale L. J. 606 (1954); Whitney, "Sources of Conflict between International Law and the Anti-Trust Laws," *ibid.* 640; Report of the Attorney General's National Committee to Study the Anti-Trust Laws, Ch. II, pp. 65-115 (Unnumbered Govt. Doc., March 31, 1955); Stocking, "The Attorney General's Committee's Report: The Business Man's Guide Through Anti-Trust," 44 Georgetown L. J. 1, 27-30 (1955); Proceedings, Section of International and Comparative Law, American Bar Association, 1953, pp. 75-100; Timberg, Emmerglick and Whitney, "Anti-Trust Problems in Foreign Commerce," 11 Record of the Ass'n. of the Bar of the City of New York 3-41 (1956); Note, "Extraterritorial Application of the Anti-Trust Laws," 69 Harv. L. Rev. 1452 (1956).

² 77 S. Ct. 144; 352 U. S. 903, 913 (1956).

³ Certiorari denied, 77 S. Ct. 96, 352 U. S. 871 (1956); opinions below, 234 F. 2d 633 (2d Cir., 1956), affirming (with modification) 133 F. Supp. 522 (D.C.N.Y., 1955).

⁴ Opinion below, 119 F. Supp. 114 (D. C. Ohio, 1954).

⁵ Whether public or private or both is not always clear; *cf.* Timberg, *loc. cit.* (note 1 above) 13-14.

JOURNAL⁶ and will not be briefed again here. Suffice it to say that both the District and the Circuit courts held that neither substantive Federal law against trademark infringement nor American Federal courts as *fora* applying Canadian law would be available to an American plaintiff seeking redress against a Canadian corporate defendant (properly found before the American tribunal) for infringing registration under Canadian law of plaintiff's trademark. For our purposes the most important aspect of the case is its interpretation of the Lanham Act in the context of the conflicts-of-jurisdiction situation before the Court. The Act protects registered trademark owners against confusing similarity, palming off, and infringement "in commerce." "Commerce" is defined by the Act as "all commerce which may lawfully be regulated by Congress." Distinguishing *Steele v. Bulova Watch Co.*,⁷ the District and Circuit courts held that Congress had not intended to reach the situation of an alien defendant whose allegedly infringing mark continued on registry under the laws of the country of his nationality, even though the effect of infringement was to affect United States commerce. Policy considerations were plainly influential. For example, the District Court spoke as follows:

[Plaintiff] urged, however, that since the Court had personal jurisdiction over the defendant, it could order the defendant to file a cancellation of its Canadian trademark and thus accomplish the same result [*i.e.*, change registration of the mark in Canada]. This attempt to do by indirection that which a Court has no power to do directly may lead only to confusion and an unseemly conflict between the Courts of two jurisdictions. [At this point the Court's note 1 cites the instance of *United States v. Imperial Chemical Industries* in conflict with the British decision in *British Nylon Spinners v. Imperial Chemical Industries*.]

We in this Country undoubtedly would be outraged if American companies having branches in foreign lands were faced with the possibility that the Courts of all these lands would assume jurisdiction to determine the rights of the American company in its home land to trademarks, copyrights, or patents granted or registered under the laws of the United States. To attempt to assert that because a Canadian company has a branch in New York, the Courts of this Country can determine its rights in Canada in Canadian trademarks registered in Canada is equally far-fetched. Such an attempted assertion of jurisdiction might provoke justified resentment. [At this point the Court's note 2 refers to the 1947 incident which resulted in the enactment in Ontario of a statute forbidding sending records out of the Province in response to external subpoenas, following an effort to conduct a grand jury investigation in the United States of possible restrictive practices in the Canadian pulp and paper industries.]⁸

The Circuit Court referred to the same range of considerations in upholding the discretion of the District Court in refusing to take jurisdiction on diversity grounds under the doctrine of inconvenient forum.⁹

⁶ 51 A.J.I.L. 103 (1957).

⁷ 344 U. S. 280 (1952); digested in 47 A.J.I.L. 318 (1953).

⁸ 133 F. Supp. 522, 528-529, and Court's notes.

⁹ 234 F. 2d 633, 647.

In *Holophane* a Delaware corporation was charged by the United States under Section 1 of the Sherman Anti-Trust Act with entering division-of-territories agreements with Holophane, Limited, a British corporation, and La Société Anonyme Française Holophane, a French corporation. The corporate ancestor of the American company was a subsidiary of the British company, which owned the basic patents and trademarks; but some years before the litigation the American group had (it was found)¹⁰ become independent. The District Court ruled that it had jurisdiction over the defendant and the subject-matter and that the United States should have a decree. The decree ordered the market-allocation agreements canceled, prohibited Holophane-U.S.A. from engaging any longer in the restrictive practices in which it had undertaken by contract to engage, and ordered the American company to take affirmative steps abroad to compete in the territories allocated by the intercompany agreements to the British and French Holophane companies.¹¹

The Supreme Court's unanimous memorandum affirmance, except for paragraph XI of the decree (not carried in the lower court report and not quoted by the memorandum decision),¹² which was affirmed by an equally divided Court, is obviously little guidance in a situation where some had expected guidance.¹³ It is necessary, in appraising the significance of the case to consider the colloquy on oral argument. It is clear from the unofficial but professional reporting¹⁴ of the oral argument in the Supreme Court that the main burden of Holophane's contention was that "international law" was violated by those portions of the District Court's decree requiring affirmative competitive conduct abroad. Counsel argued:

. . . . [P]ersonal jurisdiction solely over American participation in the agreement did not give the district court power to order affirmative business acts abroad in violation of the territorial agreement. There are two things wrong with this direction of affirmative action abroad. First of all it violates "the principles of the law of nations recognized by this Court" in such cases as *Ware v. Hylton*, 3 U. S. 199, and *The Apollon*, 221 U. S. 159; and second, it gives the antitrust laws extra-territorial effect in countries where the agreement in question is perfectly legal.

In questioning counsel for Holophane and for the United States, members of the Court showed awareness of the problem which would exist if the affirmative action required of the defendant should give rise to liability

¹⁰ Findings of Fact Nos. 10 and 11, 119 F. Supp. 114, 116.

¹¹ New York Times, Nov. 14, 1956, Financial Section.

¹² 1954 Trade Cases ¶ 67,679 should be referred to for the terms of the decree. Par. XI is the portion of the decree, paraphrased in the text above, requiring affirmative competitive action by the defendant. The affirmance by even division is tantalizing.

¹³ Two members of the California Bar with experience and professional interest in the future of antitrust decrees directing conduct abroad expressed such expectations during their participation in the Second Summer Workshop in International Legal Studies at the University of California School of Law (Berkeley), 1956.

¹⁴ 25 Law Week 3141 (1956).

under the law of the place of acting. Some of the hints as to possible lines of relation or thinking are interesting:

(1) Defendant in the American proceeding might be ordered to get a declaratory judgment in the foreign court that the restrictive agreement cannot be performed for illegality under American law (The Justice Frankfurter). In reply counsel for *Holophane* took the position that the American court would not have this power, because it would "collide" with foreign law, i.e., British law under which the agreement would be legal. In response, the Justice mooted whether British law were so plain, mentioning the Monopoly Law; but counsel persisted in his view.

(2) Counsel for the United States emphasized that there had been no showing that the affirmative acts required by the decree would violate any foreign law or the valid judgment of any foreign court. In ensuing discussion on proof of foreign law the Government contended that *Holophane* would have to prove clear illegality under foreign law and that the Court should not take judicial notice of the foreign law on this particular.

(3) There can be detected in the colloquy intimations that in the eventuality that the defendant find itself directed to violate foreign law, hardship might be mitigated by subsequent interpretation of the prior American decree. Thus, counsel for the Government suggested that the decree in the *Holophane* case might not necessarily require the defendant to go abroad and act so as to subject itself to the jurisdiction of a foreign court, but counsel was not willing to concede that the decree could be satisfied (without any showing of clear breach of foreign law) simply by *Holophane's* holding itself out in this country as willing to sell within the territories allocated by the agreement to the British and French companies. With respect to the suggestion that the American decree might be modified in the event of trouble for the defendant under foreign law, it was suggested from the bench: ". . . it does not look well for this country to wait until a foreign suit is filed and then . . . say that the decree should be changed."

Holophane, it might thus be said, raises more questions than it answers with respect to how the situation of the actor caught between the conflicting demands of two legal systems is to be treated; but in net effect the affirmance makes extremely short shrift of the argument that "international law" forbids the United States to attach legal consequences to economic conduct having either its location or its effects partially or principally outside American territory, assuming the actor to be sufficiently present in the United States for judicial jurisdiction to attach to it and the conduct *per se* a violation of the antitrust laws.

The contrasts between the two cases may be generalized as follows:

(1) *Holophane* confirms that basic American antitrust legislation such as the Sherman Act is not to have the spatial sweep of its language restricted by judicial interpretation narrowly based on the territorial principle of jurisdiction, despite assertions that "international law" requires this result.¹⁵ But in *Vanity Fair Mills* we see the American Federal courts,

¹⁵ Cf. Haight and Whitney, *loc. cit.* (note 1 above). It is assumed throughout this editorial that the type of "jurisdiction" under discussion is that relating to capacity

from trial to highest, refusing to give a similarly wide territorial scope to equally sweeping language in a statute (Lanham Act) designed to protect industrial property against infringement and unfair competition. Both decisions came down after certain unhappy experiences in which the American courts and the Department of Justice felt the resistance of other national states to the efforts of this country to inquire into or regulate restrictive practices involving the nationals or the national interests of other states and taking place wholly or partially outside the United States.¹⁶ In *Holophane* the conflicts-of-jurisdiction problem was considered during oral argument but was not decisive. In *Vanity Fair Mills* both the District and the Circuit Courts developed their interpretative arguments regarding the reach of the Lanham Act and their policy viewpoints with respect to *forum non conveniens* with the diplomatic intervention in the *Anglo-Iranian Oil Case*, the *Imperial Chemicals-Nylon Spinners* contretemps, and the Canadian paper pulp incident plainly in mind, as the courts' footnotes show.

(2) To the extent that the rest of the world, or a goodly portion of it, may be a bit out of step with United States policies regarding enforced competition (particularly where the combination, contract or conspiracy amounts to a *per se* violation of the American antitrust laws), *Holophane* tends to perpetuate and increase conflicts of national state jurisdiction. *Vanity Fair Mills*, on the other hand, goes to extremes to avoid possible conflicts of jurisdiction, legislative or judicial, between foreign trademark registration and an American statute which falls mainly into the unfair competition (as distinguished from restrictive and monopolistic practices) category.

Pending the day of the solution of problems of conflicts of jurisdiction in the restrictive and unfair trade practices areas by international legislation¹⁷—a day which does not appear imminent—more systematized and more continuous national attention than courts alone can give to the resolution of pressing problems of conflicts seems highly desirable in the interests of good foreign relations, justice, and policy effectiveness. In other areas of importance where the commands of sovereign states conflict, international practice or international agreements have worked out solutions to remove

to attach legal consequences to conduct, not power to apply state power in direct enforcement of commands. Obviously the territorial principle is exclusive in the latter situation, unless the territorial state has waived in some way its otherwise sovereign power to execute laws within its borders.

¹⁶ As in the well-known incidents involving (i) the efforts to subpoena foreign-held records of the Canadian pulp and paper consortium and those of the Anglo-Iranian Oil Company; (ii) the impasse with respect to the nylon patents in Great Britain. In *Re Grand Jury Subpoena Duces Tecum*, 72 F. Supp. 1013 (S.D.N.Y., 1947); In *Re Investigation of World Arrangements*, 107 F. Supp. 628 (D.C.D.C., 1952); *U. S. v. Imperial Chemical Industries*, 105 F. Supp. 215 (D.C.S.D.N.Y., 1952); *British Nylon Spinners v. Imperial Chemical Industries*, [1953] 1 Ch. 19.

¹⁷ See Timberg, "International Combines and National Sovereigns," 95 U. Pa. L. Rev. 575 (1947); and cf. Stocking, *loc. cit.* (note 1 above); Schwartz, "Committees, Politics, Scholarship and Law Reform: Antitrust Studies in Perspective," 104 U. Pa. L. Rev. 153 (1955).

or minimize the conflicts. Similar developments are needed here, especially with respect to justice for the person or private entity caught between the competing sovereign wills. But before this needed work can be done it will be necessary for us to clear away some underbrush and to point up our thinking on issues such as these:

(a) Precisely what "international law," public or private or both, are we talking about when we argue that the application of the antitrust law to conduct abroad is forbidden by international law?¹⁸

(b) If we are talking about international public law, are we talking about the necessity of the United States having an internationally recognized basis of legislative jurisdiction, as under the territoriality principle, the protective principle, the nationality principle, etc.? Or are we arguing that all national law is required by international law to be confined to territory or nationality?

(c) Is there possibly a problem of denial of justice or violation of the minimum standard for the treatment of aliens should the United States under its laws compel the alien present before its courts to act or to refrain from acting outside the United States in circumstances where obedience to the American command will subject him to civil or penal liability under the laws of the country of his nationality or of another country having a basis of jurisdiction which international law recognizes?

It is these issues, primarily, which have been avoided in much of the literature and in many of the judicial decisions, such as those cases which have directed attention to presence, *vel non*, of the defendant, to the exclusion of the basis or bases of legislative jurisdiction over him.

The listed issues ought to be faced, not only by courts from case to case but by international lawyers, legislators and administrators.

COVEY T. OLIVER

PASHUKANIS IS NO TRAITOR

Eugene B. Pashukanis is no longer an "enemy of the people." For the Soviet legal scholar this announcement is as exciting as it would be for the American if the National Archives were to state that new evidence had disclosed that Benedict Arnold was not a traitor. For nearly twenty years the very name Pashukanis had been so besmirched as to blacken also the reputation of any Soviet lawyer who had been closely associated with him or who had expressed ideas identifiable as similar to his.

Pashukanis' case had been something of a mystery since that morning of January 20, 1937, when an article in *Pravda* announced that the man who only two months before had been named to supervise the revision of the whole pattern of Soviet codes of law had been found to be an "enemy of the people."¹ No overt act of treachery was disclosed. He was criticized primarily for having preached a philosophy of law which, had it been followed to its conclusions, would have undermined the foundations of the

¹⁸ Cf. Jessup, *Transnational Law* (1956), reviewed below, p. 444.

¹ For a record of the denunciation and the texts of the principal works of Pashukanis and his denouncers, see V. I. Lenin *et al.*, *Soviet Legal Philosophy* (20th Century Legal Philosophy Series, 1951).

Soviet state, and it was hinted that his theory had been developed for the purpose of bringing about the end of the Soviet system of government. His principal accuser, Andrei Vyshinsky, later became specific and said that Pashukanis had violated an article of the criminal code which required that a person accused under its provisions be found guilty of criminal intent to overthrow the Soviet regime. No public trial was held, however, so that no outsider could tell what, if any, the actual charges were and what, if any, proof other than Pashukanis' own writings had been introduced against him.

Vyshinsky is now dead, and his master, Joseph Stalin, has also died. Both have since been denounced for their misdeeds, and new policies have been introduced by their surviving colleagues to serve as the basis for what has been heralded as a new attitude toward the rôle of the Soviet state, both in relation to its own citizens and in relation to the foreign states with which it must conduct its international relations. The rehabilitation of Pashukanis, albeit posthumously, seems to be a part of the reappraisal of Soviet policies which has been developing within the Kremlin since Stalin's death in March, 1953.

Only scanty comment has yet appeared to explain the momentous reversal of policy on Pashukanis. In an unsigned leading article in the law review published by the Institute of Law of the Academy of Sciences of the U.S.S.R. in September, 1956,² the editorial board takes to task the one-time editor of the review and leading lawyer of the Academy of Sciences, namely, Andrei Vyshinsky, for writing in 1938 that "for an unfortunately long period the direction of our legal science did not correspond to the interest of the building of socialism" and for laying this failure to the consequences of "wrecking" in the field of legal philosophy. The editors of the law review now ask the legal scholars of the U.S.S.R. to restudy the era of the 1920's and early 1930's without the handicap that has existed up to the present of having to avoid any interpretation which would have cast Pashukanis in the position of one who was not a "wrecker." The editors now say that Vyshinsky's criticism was incorrectly linked with the activities of "such notable former representatives of Soviet legal science as P. I. Stuchka, N. V. Krylenko, E. B. Pashukanis, N. I. Chelyapov and others."

Pashukanis is not being given a completely clean bill of health. The editors now say that he committed a large number of serious errors, but that this fact should not be permitted to conceal his "not insignificant positive role in the development of Soviet legal science and Soviet legislation." The charges of harmful anti-Soviet activity which Vyshinsky had leveled are specifically declared to have been unfounded. The door has been opened, so the editors now say, to scholarly criticism of the views of Pashukanis and his colleagues without the hindrance previously created by the labels of "wreckers" hung around their necks.

Only Pashukanis of the group of four men specifically named as im-

² "For an authoritative scientific reworking of the root questions of the science of the history of the Soviet state and law" (in Russian), *Sovetskoe Gosudarstvo i Pravo*, No. 6 (1956), p. 3 at p. 10.

properly associated with charges of treason by Vyshinsky had concerned himself in detail with international law. Krylenko had been known first as an architect of the Soviet system of legal institutions as they were established to meet the needs of the New Economic Policy in 1922, and then he had gained wide recognition as State Prosecutor and finally as People's Commissar of Justice. Stuchka had achieved his reputation as the People's Commissar of Justice in 1918, when the first Soviet courts were beginning to function, and later as theoretician for Soviet lawyers generally. Chelapov as a professor of law had been one of the principal legal authorities known to explain the meaning of the Constitution of the U.S.S.R. adopted in 1936. The rôles played by these three men were in the domestic field and their acquittal posthumously of the crimes charged against them will probably have little influence upon Soviet writing in international law over the coming year. Pashukanis' position was different, and his posthumous acquittal may result in a series of Soviet legal studies which will attract attention from international lawyers outside the U.S.S.R. as a departure from what has been written since 1938 by Soviet authors about international law.

Pashukanis' major work on international law,³ which has become a bibliographical rarity because of the destruction of most copies subject to Soviet control after his denunciation in 1937, declared scholastic any attempt to define the "nature of international law."⁴ Pashukanis thought that prior discussions of the subject had been the result of the continuing influence of bourgeois legal methodology, which he said rested upon an association of law with substance developing in accordance with its own internal principles. Pashukanis urged his readers to see that international law was a means of formulating and strengthening in custom and treaties various political and economic relationships between states, and that the U.S.S.R. could use international law to further Soviet interests in a struggle with capitalist states. Pashukanis saw no reason to suppose that in utilizing principles of international law for its own purposes the U.S.S.R. was thereby compromising its principles in an effort to live in a world which held states defending the conflicting interests of different classes. Pashukanis would have frowned upon the lengthy discussions among Soviet authors after his death regarding the nature of international law as reflected in the books and articles which tried to determine whether international law was by nature "bourgeois" or "socialist" or something in between. This discussion would have seemed to him "scholastic" and of no real help in conducting Soviet foreign policy.⁵

The road was already being cleared for a new approach to international law by Soviet authors before the editors of the article of September, 1956, told their readers to take a fresh look at Pashukanis' idea. Readers of this JOURNAL are familiar with the series of Soviet articles which Professor

³ I. Pashukanis, *Ocherki po Mezhdunarodnomu Pravu* [Essays in International Law] (Moscow, 1935).

⁴ *Idem* at 16.

⁵ For a more detailed analysis of Pashukanis' position, see Kelsen, *The Communist Theory of Law* 152-156 (1955).

W. W. Kulski has summarized for American scholars.⁶ The series began with Eugene A. Korovin's renewed effort after the war to bring about a reconsideration of the nature of international law and of the problem presented in his view that law must to a Marxist be class law, and that international law must therefore be classifiable either as "bourgeois" or "socialist" or something in between, since it is espoused by bourgeois and socialist states in their relationships. This series of articles had ended with an editorial discarding the attempt to find the true nature of international law and a recommendation that Soviet writers settle down to the more practical work of exploring the function of the various rules of international law so that the U.S.S.R. might apply them to its advantage.

If Pashukanis' view is again to receive favor, there will be less philosophical writing about the nature of international law and more attention to its practical details and their application to the specific problems with which Soviet foreign policy-makers have to deal. Soviet authors may become pragmatists in their attitude toward international law and retreat from the spinning of fine theories. Such a position would facilitate the Soviet campaign for "co-existence" between the "socialist" and other camps, for attention could be centered on single problems and there would be no need to talk about the fundamental problem of the conflict between states of differing economic systems. This policy would be in accord with Nikita Khrushchev's declaration at the 20th Communist Party Congress in 1956 that there need no longer be consideration of the inevitability of war between the capitalist and socialist camps.

No one who has sampled the large body of Soviet literature since Lenin will conclude from the new approach that Soviet policy-makers have cast from their minds their hope and expectation eventually of spreading the Soviet system throughout the world, yet under the new policy there may be less said about the "conflict" than there has been in the years since Pashukanis' death.

JOHN N. HAZARD

THE NEW U. S. ARMY FIELD MANUAL ON THE LAW OF LAND WARFARE

The times of ignoring the laws of war are over: new treaties have been concluded concerning the laws of war, there is a considerable literature, and states are again issuing Instructions to their armed forces on the laws of war and neutrality. The United States has recently published new Instructions on the Law of Naval Warfare¹ and now a Field Manual on the Law of Land Warfare.²

The Manual is, generally speaking, restricted to the conduct of warfare on land and to relationships between belligerent and neutral states; but

⁶ Kulski, "The Soviet Interpretation of International Law," 49 A.J.I.L. 518 (1955).

¹ U. S. Department of the Navy, *Law of Naval Warfare* (September, 1955).

² U. S. Department of the Army, *Army Field Manual: The Law of Land Warfare* (July 18, 1956, 236 pp.). It supersedes the Field Manual of Oct. 1, 1940, including C 1, Nov. 15, 1944. The new Manual consists of 552 paragraphs, arranged in nine chapters (further cited as Manual).

it also governs naval forces operating on land.³ The Manual is in every point, and particularly with regard to fundamental problems, in harmony with the Law of Naval Warfare. Although the Manual is an official publication of the U. S. Army, its provisions are neither statute nor treaty and should not be considered binding upon courts and tribunals applying the laws of war, although such provisions are of evidentiary value.⁴

The Manual is based on the firm conviction that there *are* laws of war, binding upon states and individuals. Their purpose is to protect both combatants and noncombatants from unnecessary suffering, to safeguard certain fundamental human rights of persons who fall into the hands of the enemy, and to facilitate the restoration of peace. [Laws of war are prohibitory; they place limits on the exercise of belligerent power, they are pervaded with the principles of humanity and chivalry.] Hence, as the Manual lays down clearly,⁵ military necessity, where not expressly foreseen in the laws of war, is no defense for acts forbidden by the customary and conventional laws of war, because the latter have been developed and framed with consideration for the concept of military necessity.⁶ The laws of war have their sources in custom and treaties. The Manual, by incorporating Hague Conventions III, IV (with the Hague Regulations on the Laws and Customs of War on Land), IX and X,⁷ proves that these conventions are still the law. The four Geneva Conventions of August 12, 1949,⁸ are fully incorporated.⁹ The Manual states¹⁰ that the customary

³ Law of Naval Warfare, sec. 240.

⁴ Manual, par. 1. In the same sense, Law of Naval Warfare, sec. 110.

⁵ Manual, par. 3.

⁶ In exactly the same sense, Josef L. Kunz, *Kriegsrecht und Neutralitätsrecht* 26-28 (Vienna, 1935).

⁷ The texts of the Hague Conventions and Regulations referred to are reprinted in 2 A.J.I.L. Supp. 85, 90, 146, 153 (1908).

⁸ French texts, *Les Conventions de Genève du 12 août 1949* (2nd ed., Geneva, 1950); English texts in T.I.A.S. Nos. 3362, 3363, 3364, 3365; Department of State Publication 3936 (General Foreign Policy Series 34, August, 1950). On pp. 233-255 of the last-named publication are printed the reservations; the United States has made only one reservation, namely, with respect to Art. 68 of Convention IV (*ibid.* 239). The Geneva Conventions were ratified by the United States on July 6, 1955, and came into force for this country on February 2, 1956. The texts of the Convention on Prisoners of War and the Convention on Protection of Civilians are reprinted in 47 A.J.I.L. Supp. 249 (1953) and 50 *ibid.* 724 (1956), respectively.

The following Commentaries have, up to now, been published by the International Committee of the Red Cross: Jean S. Pictet, *Commentaire à la première Convention de Genève de 1949* (Geneva, 1952); Jean de Preux, *Etude sur la troisième Convention de Genève de 1949* (Geneva, 1954); *La Convention de Genève relative à la protection des personnes civiles en temps de guerre* (Geneva, 1956, 729 pp.). See also J. Vergès, *La 4^e Convention de Genève de 1949, Exposé documentaire* (Lyon, 1952); Frodin, *La 4^e Convention de Genève, Protection Civile* (Paris, 1953); Ginnane and Yingling, "The Geneva Conventions of 1949," 46 A.J.I.L. 383 (1952); and Pictet, "The New Geneva Conventions for the Protection of War Victims," 45 *ibid.* 462 (1951).

⁹ The Manual (par. 57) also incorporates the so-called "Roerich Pact" of April 15, 1935 (49 Stat. 3267, Treaty Series, No. 899; 30 A.J.I.L. Supp. 195 (1936)), although only the United States and a number of the American Republics are parties to this treaty. See the corresponding UNESCO treaty signed at Paris on Sept. 30, 1953.

¹⁰ Manual, par. 7.

law of war, being part of the law of the United States, will be strictly observed by the United States; treaties must be observed by both military and civilian personnel with the same strict regard for both the letter and the spirit of the law which is required with respect to the Constitution and statutes. As treaty provisions "are in large part but formal and specific applications of general principles of the unwritten law," the treaty provisions quoted will be strictly observed and enforced by the United States forces without regard to whether they are legally binding upon this country.

It is fundamental that the laws of war, notwithstanding the prohibition of the use of force in the United Nations Charter, are fully reaffirmed. The application of the laws of war is, in conformity with Article 2 of all four Geneva Conventions of 1949, greatly expanded. They apply not only to declared wars, but to any other international armed conflict, and, in a restricted sense, to civil war, even when the insurgents are not recognized as a belligerent party. They apply particularly to the exercise of armed force pursuant to a recommendation, decision or call by the United Nations, to the exercise of the inherent right of individual and collective self-defense against armed attack, or in the performance of enforcement measures through a regional arrangement, and they apply equally to all belligerents.¹¹

Equally clear is the standpoint of the Manual toward the law of neutrality. The latter plays, indeed, a very important rôle in the Geneva Conventions of 1949.¹² The Manual¹³ states that, if a United Nations Member is called upon under Articles 42 and 43 of the Charter, it loses its neutrality only to the extent that it complies with the direction of the Security Council.¹⁴ There is, therefore, room for classic neutrality and a "military commander in the field is obliged to respect the neutrality of third States." Chapter 9¹⁵ enumerates the rights and duties of neutral states, quoting Hague Convention V. ✓

Some chapters of the Manual largely repeat the corresponding rules of the Geneva Conventions of 1949 in bold print. This is the case concerning Protecting Powers,¹⁶ concerning the Wounded and Sick,¹⁷ and concerning

¹¹ Manual, par. 8a. This corresponds perfectly with the practice of states in the Korean conflict and shows the untenability of the proposals for "discriminatory" laws of war; see this writer's "The Laws of War," 50 A.J.I.L. 313-337 (1956). The same idea is thus expressed in Law of Naval Warfare, sec. 200: "Distinction must be made between the resort to war and the conduct of war. Whether the resort to war is lawful or unlawful, the conduct of war is regulated by the laws of war."

¹² See Josef L. Kunz, "The Geneva Conventions of August 12, 1949," Law and Politics in the World Community 279-316, 368-373 (Berkeley, University of California Press, 1953).

¹³ Par. 513.

¹⁴ Law of Naval Warfare, sec. 232, states equally that there may not only be qualified neutrality, but classic neutrality: "The obligations of the member States, incompatible with neutrality, come into existence only if the Security Council fulfills the functions delegated to it by the Charter. If the Security Council is unable to fulfill its assigned functions, the members may, in case of a war, remain neutral and observe an attitude of strict impartiality."

¹⁵ Pars. 512-552.

¹⁶ Pars. 15-19.

¹⁷ Ch. IV, pars. 208-245, embodying Geneva Convention II. This chapter deals also with the Red Cross Emblem.

Civilian Persons.¹⁹ The same is true with regard to prisoners of war,²⁰ but here a number of interesting explanations with regard to certain points of the laws of war as currently interpreted can be seen. Paragraph 63 states that

commando forces and airborne troops, although operating by unusual trained methods of surprise and violent combat, are entitled, as long as they are members of the organized armed forces of the enemy and wear uniform, to be treated as prisoners of war upon capture, even if they operate singly.²⁰

Under Article 5 of the Geneva Convention of 1949 concerning Prisoners of War, prisoners of war are under the protection of the convention "from the time they fall into the power of the enemy until their final release and repatriation." But the moment of the beginning of captivity has often presented difficult problems. The Manual²¹ now defines the phrase "fall into the power of the enemy" as "having been captured by, or surrendered to members of the military forces, the civilian police, or local civilian defense organizations or enemy civilians who have taken him into custody." Also of interest is the attitude with regard to Article 118 of the Geneva Convention of 1949 on Prisoners of War concerning the release and repatriation of prisoners without delay after the cessation of active hostilities. This article, as is well known, led to considerable difficulties in the negotiations for an armistice in Korea and to an *ad hoc* settlement. Paragraph 199 states:

A Detaining Power may, in its discretion, lawfully grant asylum to prisoners of war who do not desire to be repatriated.

But there is no doubt that Article 118 stands in need of revision.²²

Of greatest interest is the treatment of the problem of spies, a topic which for a long time has needed clarification and revision. The Manual²³ gives the definition of spies according to Article 29 of the Hague Regulations of 1907, and according to Article 106 of the United States Uniform Code of Military Justice; where these two definitions are not in conflict they will be applied and construed together; otherwise Article 106 governs American practice. The problem of espionage has long been somewhat like a legal puzzle.²⁴ Every writer has had to concede that the employment of spies by belligerents is perfectly lawful. But, it has been argued, "espionage has a twofold character": the employment of spies is lawful, but the spy is a war criminal,²⁵ an obviously untenable construction. This writer

¹⁹ Cf. V, para. 249-350, incorporating Geneva Convention IV, apart from the prohibition dealing with civilian persons in belligerent-occupied territory.

²⁰ Cf. III, para. 60-207, incorporating Geneva Convention III.

²¹ This paragraph is taken textually from Oppenheim-Lauterpacht, *International Law*, Vol. II, p. 259 (7th ed., 1952).

²¹ Par. 84b.

²² See Josef L. Kunz, "Die Korcanische Kriegsgefangenenfrage," *Archiv des Völkerrechts* 408-423 (1954).

²³ Par. 75.

²⁴ Cf. Iwan Stone, *Legal Controls of International Conflict* 563 (New York, 1954).

²⁵ Thus, Oppenheim-Lauterpacht, *op. cit.* note 20 above, p. 422.

²⁶ *Op. cit.* note 6 above, pp. 67-69.

as early as 1935 developed the theory that espionage is not an illegal but a "risky" act. Espionage is lawful under international law; but as it is particularly dangerous to the enemy, international law authorizes a belligerent as an exception to treat a spy caught *in flagranti*, not as a prisoner of war, but as punishable. It is not a question of punishment for a crime, but of a repressive measure against a dangerous although lawful act. This construction has been accepted by Walter Schätzel and Erik Castrén.²⁷ The Manual has now adopted the "risky" act theory. Paragraph 77 reads:

Resort to that practice (employing spies) involves no offense against international law. Spies are punished, not as violators of the laws of war, but to render that method of obtaining information as dangerous, difficult and ineffective as possible.

As to sanctions for the violations of the laws of war²⁸ the Manual deals in detail with reprisals and recognizes crimes against peace and against humanity, but deals primarily with war crimes, defined as "violations of the laws of war by any person or persons, military or civilian." The Geneva Conventions of 1949 avoid the term "war crimes" and speak rather of "grave breaches." The Manual, among newest developments, states²⁹ that in some cases, "military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control." Such responsibility arises, of course, when such acts have been committed in pursuance of an order of the commander concerned. But he is also responsible if he has actual knowledge, or should have knowledge, and if he fails to take the necessary and reasonable steps to insure compliance with the laws of war or to punish violations thereof. The defense of superior orders³⁰ "does not lie unless the accused did not know and could not reasonably have been expected to know that the act ordered was unlawful." But superior orders may be considered in mitigation of punishment. To strike a correct balance it is added:

In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal.³¹

It is most important to note that paragraph 506 of the Manual expressly states that the belligerents are under an obligation to take measures for

²⁷ Erik Castrén, *The Present Law of War and Neutrality* 154 (Helsinki, 1954).

²⁸ Ch. VIII, pars. 495-511.

²⁹ Par. 501.

³⁰ Par. 509.

³¹ This paragraph is taken from Oppenheim-Lauterpacht, *op. cit.* at 569. Law of Naval Warfare, sec. 330 b(1) adds: "If an act, though known to the person to be unlawful at the time of commission, is performed under duress, this circumstance may be taken into consideration either by way of defense or in mitigation of punishment."

the punishment of war crimes committed by all persons, including members of a belligerent's own armed forces.

Certain parts of the laws of warfare on land are particularly in need of revision, either because the treaty law of 1907 is incomplete or now inadequate, or because of new developments. These parts concern the non-hostile relations of belligerents, nearly every point of the law of belligerent occupation, and vital problems as to the actual conduct of war. A real revision of these parts of the law can, of course, only be brought about by international procedures of law-making and not by a Field Manual of one state. But the Manual gives the present status of these problems, either deduced from general principles of the laws of war, or from a consensus of nations, formed as a consequence of the two world wars, or at least expressing the attitude which the United States is now taking pending an international revision of the problem in question.³²

As to non-hostile relations of belligerents,³² the Manual reprints the few rules of the Hague Regulations of 1907 concerning envoys to negotiate a truce, capitulations and armistices, and supplements them with many paragraphs summarizing the usage of nations. Paragraph 476 speaks of unconditional surrender as one "in which a body of troops gives itself up to the enemy without condition; it need not be effected on the basis of an instrument signed by both parties." But that is rather what Oppenheim Lauterpacht³³ calls a "simple surrender" without capitulation; for capitulation is a convention stipulating special terms of surrender. Such simple surrenders by some soldiers or a man-of-war or a fortress have always occurred. But the new concept of "unconditional surrender" at the end of the second World War is something different and new. This new "unconditional surrender" terminates hostilities without any agreement—it is neither a capitulation nor an armistice—and may be followed by the assumption of supreme authority which also, in spite of continued occupation of the vanquished country, terminates the technical status of belligerent occupation.³⁴

The problem of belligerent occupation is dealt with by the Manual in a detailed way.³⁵ It prints the corresponding norms of the 1907 Hague Regulations and of the Geneva Convention of 1949 on Protection of Civilians, which, in its own words, is supplementary to the Hague Regulations. Respect for human rights, the prohibition of deportations, transfers, evacuation, care for children, hygiene and public health, relief service of inhabitants, measures of security for the occupant, protection of civilian populations in occupied territory, prohibition of reprisals against protected civilians and against taking hostages are all incorporated. The

³² Ch. VII, pars. 449–494.

³³ *Op. cit.* 543, 545.

³⁴ In this sense "unconditional surrender" was only applied to Germany. All the other enemy states were also required to surrender unconditionally, but the same term had a different legal meaning. Thus Japan's unconditional surrender was preceded by negotiations in which the Allies accepted Japan's condition of the continuance of Japan's Emperor. In the case of Italy, notwithstanding her unconditional surrender, an ordinary armistice agreement was concluded.

³⁵ Ch. VI, pars. 351–448.

can be no doubt that the fourth Geneva Convention represents great progress, inspired by excesses, particularly by Germany as a belligerent occupant in the second World War. Yet many problems concerning the legal position of the belligerent occupant, his rights and duties, and the corresponding rights and duties of the civilian population stand in need of revision as a consequence of the change in the conduct of war, the enormous importance of economic warfare and the far-reaching change in general conditions. The Manual clearly distinguishes belligerent occupation from both mere invasion and conquest and subjugation. It reflects modern war conditions, if paragraph 352 states that "an invader may attack with naval or air forces or troops may push rapidly through a large portion of enemy territory without establishing that effective control which is essential to the status of occupation." For "occupation is invasion plus taking firm possession of enemy territory for the purpose of holding it."³⁶ Occupation presupposes legal effectiveness, which therefore must not only be established but also be maintained. It corresponds to experiences of the last war that military government can also be established over allied or neutral territory, recovered or liberated from the enemy, when that territory has not been made the subject of a civil affairs administration agreement.

As belligerent occupation does not transfer sovereignty, it is unlawful for a belligerent occupant to annex occupied territory or to create a new state therein while hostilities are still in progress.³⁷ In conformity also with experiences of the last war, paragraph 366 lays down as law that

the restrictions placed upon a belligerent government cannot be avoided by a system of using a puppet government, central or local, to carry out acts which would be unlawful if performed directly by the occupant. Acts induced or compelled by the occupant are nonetheless its acts.

Difficulties appear, however, in the paragraphs dealing with the determination whether property is public or private,³⁸ and with the problem of currency and exchange controls.³⁹

Julius Stone⁴⁰ has, in a detailed investigation of the present status of the law of belligerent occupation, directed attention to the fact that the corresponding rules of the Hague Regulations, even if their text stands,

³⁶ This definition is taken from Oppenheim-Lauterpacht, *op. cit.*, Vol. II, p. 434.

³⁷ Par. 358.

³⁸ "Under modern conditions, the distinction between public and private property is not always easy to draw. . . . It is often necessary to look beyond strict legal title and to ascertain the character of the property on the basis of the beneficial ownership thereof." (Par. 394.)

³⁹ The occupying Power is also "authorized to introduce its own currency or to issue special currency for use only in the occupied area, should the introduction or issuance of such currency become necessary. The occupant may also institute exchange controls, including clearing arrangements." But such measures must not be utilized to enrich the occupant or to circumvent restrictions; debasement of currency by fictitious valuations or exchange rates, as well as failure to take reasonable steps to prevent inflation, are violative of international law. (Par. 430.)

⁴⁰ *Op. cit.* 693-732.

are no longer adequate because they are based on nineteenth-century conceptions of a laissez-faire economy in the states of both the occupant and the occupied.⁴⁰ With the great expansion of governmental functions and techniques, with such basic state functions as assuring minimum standards or functions of currency, banking, debt, exchange, import and export control, with the shifting boundaries of public and private property, the rules based on entirely different conditions are out of harmony. It speaks, therefore, of "the twilight of occupation law" and concludes that

before the law of belligerent occupation can emerge from this twilight, a rethinking is required going far beyond mere revision and which (despite its advances in other respects) the relevant Geneva Convention of 1949 has not provided.⁴¹

As to the rules concerning the actual conduct of hostilities,⁴² the Manual strongly opposes those who would keep only the "humanitarian" laws of war and drop all rules concerning the actual conduct of war.⁴³ The right of belligerents to adopt means of injuring the enemy is *not* unlimited—a rule which remains the law. But there is no doubt that these norms incomplete or antiquated as they are, are greatly in need of revision. For instance, the problem of the dividing line between permissible ruses of war and forbidden treachery is, as paragraph 50 states, sometimes indistinct. The Manual states that absolute good faith must be observed as a rule of conduct. It would, therefore,

be an improper practice to secure an advantage of the enemy by deliberate lying or misleading conduct which involves a breach of faith or when there is a moral obligation to speak the truth.

But the employment of spies, encouraging defection or insurrection among the enemy civilian population, corrupting enemy civilians or soldiers or saboteurs, or inducing the enemy's soldiers to desert, surrender or rebel are not prohibited.⁴⁴ Legitimate war ruses also include ambushes, dummies, mines, and psychological warfare activities.⁴⁵ Use of national flags, insignia, and uniforms as a disguise is taken to be authorized, although to employ them during combat is certainly forbidden.⁴⁶ Devastation as an end in itself or as a separate measure of war is not sanctioned by the laws of war. The measure of permissible devastation is found in the state necessities of war.⁴⁷ As to persons descending by parachute, it is laid down, in conformity with modern usage, that such persons, when they are trying to escape from a disabled aircraft, may not be fired upon. Weapons employing fire, such as tracer ammunition, flame-throwers,

⁴⁰ *Ibid.* 732.

⁴² Ch. II, pars. 20–59.

⁴¹ See Kunz, "The Laws of War," *loc. cit.* (note 11 above) 321–325.

⁴³ Par. 49.

⁴⁵ Par. 51.

⁴⁶ Par. 54. Because Art. 23f of the Hague Regulations forbids only their "improper use."

⁴⁷ Manual, par. 56. Kunz, *op. cit.* (note 6 above) 84–85.

⁴⁸ Par. 30. Thus also Spaight, *Air Power and War Rights* (3rd ed., 1947); Oppenheim-Lauterpacht, *op. cit.* 521; and the proposed Hague Air Warfare Rules, 1923; de Gaulle, *op. cit.* 400.

napalm and other incendiary agents, against targets requiring their use are not violative of international law; but they must not be employed in such a way as to cause unnecessary suffering to individuals.⁴⁹ Paragraph 42 lays down that "there is no prohibition of general application against bombardment from the air of combatant troops, defended places, or other legitimate military objectives." As to gas and bacteriological warfare, paragraph 38 states that

the United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or non-toxic gases, of smoke or incendiary materials, or of bacteriological warfare. The Geneva Protocol of 1925 has not been ratified by the United States and is not binding on this country.⁵⁰

Paragraph 35 states that

the use of explosive atomic weapons, whether by air, sea, or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment.⁵¹

It is obvious that a restriction or prohibition of chemical, bacteriological, and atomic war is only possible by international agreement to which at least all militarily important states are parties. Negotiations for such agreement have been under way since the end of World War II, but, in a world which is lacking confidence, have not yet led to positive results.

JOSEF L. KUNZ

INTERNATIONAL PARLIAMENTARY LAW

There seems to be a tendency in the current literature on international law to introduce an abundant new terminology. The terminology suggests in many instances that the field should be broken up and studied under separate captions. Some of the labels parallel equivalents in the national legal system; thus we have references to "international administrative law" and "international constitutional law." One is familiar with the classifications of Professor Schwarzenberger, particularly his "international economic law."¹ There is also a well-known school which deals with "international penal law" or "international criminal law."² "International air law" was the subject of a round table in the 1956

⁴⁹ Par. 36.

⁵⁰ Par. 38 is restricted to this negative statement. Law of Naval Warfare, sec. 612, states that the U. S. is not a party to any treaty forbidding or restricting these methods of warfare and that it, therefore, "remains *doubtful* that, in the absence of a specific restriction established by treaty, a State legally is prohibited at present from resorting to their use." Footnote 8 adds that poisonous gases and bacteriological weapons may be used only if and when authorized by the President.

⁵¹ In the same sense Law of Naval Warfare, sec. 613. Footnote 9 adds that nuclear weapons may be used by U. S. forces only if and when directed by the President.

¹ See Schwarzenberger, "The Province and Standards of International Economic Law," 2 International Law Quarterly 402 (1947).

² See Glaser, Introduction à l'Etude de Droit International Pénal (1954).

Proceedings of this Society.⁸ One also recalls the school which stresses regional international law, for example, "American International Law."⁹ A less familiar label is "international uniform law" which, it is suggested, "is entitled to occupy a separate scientific position next to Public International Law and Private International Law."⁵ There has even been a recent suggestion that all of these legal fields, including the traditional public international law and private international law, should be combined under the label "transnational law." As one examines the use of this terminology one has the impression that one finds here more than any other field of law a host of labels for subtopics in public international law comparable to the traditional subjects of treaties, responsibility of states, jurisdiction, etc. These labels may be useful as a means for emphasizing new problems which deserve separate study, but their indiscriminate use might lead to a situation in which one loses a sense of unity. Professor Schwarzenberger has warned us:

When, therefore, there is a new *dernier cri*, such as suggestions for the development of an international criminal law, it is advisable not to follow uncritically in the train of the enthusiastic protagonists of such an idea, but to pause and reflect on the meaning and value of it all.⁶

Nevertheless the writer risks suggesting still another label for the purpose of calling attention to a subject which may be of growing importance and which might throw further light on the study of international organization; this comment therefore deals with "international parliamentary law."

The term "international parliamentary law" is used to refer to the equivalent in international organizations of the familiar parliamentary law in national legislative assemblies. One is aware that in all national legislatures, whether based on the parliamentary form of government or not, the term "parliamentary law" is commonly used to describe the rules of procedure which govern the actions of the legislative body. In the United States and elsewhere some of these rules of procedure are included in Constitutional provisions and others are laid down in separate rules. In any case, the standing rules are commonly adopted by the legislative body. Recently the matter has attracted considerable attention in the United States because of the debates in the Senate concerning a proposed change in the rules to limit filibusters. Vice President Nixon as presiding officer of the Senate on January 4 made a ruling concerning the propriety of the Senate to change its rules, resting his conclusion upon Constitutional principles.⁷

The question is posed whether these rules of procedure are properly designated "law." There is a rather surprising paucity of literature

⁸ 1956 *Proceedings*, American Society of International Law 84-115. Cf. Matczak, *Revue de Droit International et de Droit Comparé* (1954).

⁹ Alvarcz, *Le Droit International Américain* (1909).

⁵ Andas, "Autonomy of International Uniform Law," 8 *Revue Hellénique de Droit International* 8, 9 (1955).

⁶ Schwarzenberger, "The Problem of an International Criminal Law," 1950 *Current International Problems* 263.

⁷ See New York Times, Jan. 5, 1957.

on the subject, but the question has received a vigorous affirmative answer from Professor R. K. Gooch.⁸ Gooch argues that the ultimate source of legislative rules of procedure is the Constitution and that therefore the rules have the same legal character as other rules of law derived from the same source. He notes that in some instances this parliamentary law even has a penal sanction as, for example, where the rules give authority to the presiding officer to discipline a member by suspension or expulsion.

In the United States the cases involving parliamentary law which have come before the courts involve generally a problem of evidence.⁹ The question generally is whether it is possible to go behind a statute as enrolled or published to show that it was not passed in conformity with the rules of the legislature. The English rule is that an Act of Parliament is final and valid if it is good on its face. But where the Act was on its face "by the King with the consent of the Lords," omitting the Commons, it was judged void.¹⁰ The courts cannot inquire into the procedures in Parliament to see if any rule was not observed.¹¹

The situation in England is simpler than that in the United States, where the American system of judicial review and the doctrine of separation of powers introduce different elements. While most cases involving legislative actions are disposed of in accordance with the rules of evidence, there is an implied and sometimes explicit consideration that the courts and the legislature are equal, co-ordinate, and independent branches of government, neither being subject to control of the other. In some cases, based upon this view, the courts have refused to act because they did not feel they had the power to consider or review the questioned actions of the legislature.¹² But the American courts tend to follow the same basic rule. In *Carlton v. Grimes* an Act of the Iowa legislature was amended after having been voted by both houses and was not voted upon or passed in the final form as signed by the President of the Senate and the Speaker. The court sustained the validity of the Act, saying that, except for a few minor constitutional provisions, the legislature was free to determine its own procedure.¹³ Under the Iowa rule, therefore, the enrolled bill is "the absolute verity" and cannot be impeached by reference to the legislative journals. So the Michigan court held that rules of legislative procedure adopted by the legislature but not prescribed by the Constitution, may be suspended and therefore action, even if contrary to the rules, cannot be reviewed by the courts.¹⁴ But the court may look at and interpret the rules in the light of the journals in the course of sustaining the validity of

⁸ Gooch, "Legal Nature of Legislative Rules of Procedure," 12 Virginia L. Rev. 527 (1926).

⁹ The writer is indebted to Mr. Leon Spoliansky of the Columbia Law School for a study of these cases.

¹⁰ *The King and the Lord Hunsdon v. The Countess Dowager of Arundel and the Lord William Howard*, Hob. 109, 80 Eng. Rep. 258 (1617).

¹¹ *Edinburgh Railway Co. v. Wanchope*, [1842] 8 CL. & F. 710, 8 Eng. Rep. 279.

¹² *Hunt v. Wright*, 70 Miss. 798, 11 So. 608 (1892); *State v. Jones*, 6 Wash. 452, 3 Pac. 201 (1893).

¹³ 237 Ia. 912, 23 N. W. 2d 883 (1946).

¹⁴ *Anderson v. Atwood, Secretary of State*, 273 Mich. 316, 262 N.W. 922 (1935).

order. In serious cases the President may propose that the Assembly pass a vote of censure which, if adopted, involves immediate exclusion for a period of from two to five days.

Thus it may be said that in the case of the adoption of rules of procedure and in decisions taken under the rules, we have another example of a situation in which a decision of the General Assembly is binding.²⁵

To be sure, in connection with the General Assembly of the United Nations or similar international bodies, one is not likely to have any question of judicial review such as that which occurs in national courts as indicated above. One can conceive of a situation in which the Security Council might adopt a resolution containing a binding decision and when the validity of the resolution might be challenged on the ground, for example, that the veto applied and had been disregarded as in the "double veto" cases.²⁶ Such an issue might conceivably be referred to the International Court of Justice for an advisory opinion and the Court might then have to deal with the Charter provision on voting and might have to interpret the Four-Power Agreement of San Francisco and the practice of the Council under it. If the Court reached the conclusion that this was a situation requiring the votes of all the permanent members of the Security Council and if the record showed that one of the permanent members had voted against, the Court might reach the conclusion that the resolution was

valid. One might also envisage a situation in which the Security Council called upon Members under Article 41 of the Charter to interrupt telegraphic and radio communication with State X. The President of the United States, under authority of Section 5(a) of the United Nations Participation Act,²⁷ might then issue an Executive Order prohibiting telegraphic and radio communications. Assume that a radio corporation paid \$10,000 under Section 5(b) of the Act for violation of the Presidential order and challenges the validity of the order on the ground that the action of the Security Council was invalid because of failure to comply with the voting rules laid down in Article 27 of the Charter and in Rule 140 of the Provisional Rules of Procedure of the Security Council. A United States court, viewing the Charter rule as equivalent to a constitutional provision, might determine whether the defendant's contention was correct.

Such hypothetical cases probably belong to a later stage of the development of the organization, but they cannot by any means be excluded.

The foregoing observations are merely designed to suggest a field of international law which contains some novel and interesting points, whether one prefers to consider the problem as an aspect of "treaty law" or as an

²⁵ For explanation of the word "decisions" see 1 U.N. Repertory vi, and United Nations, *Répertoire of the Practice of the Security Council* 2 (1954). See especially report of the Secretary General in U.N. Doc. A/1356, Annexes (V) 49 (1950), par. 27. See, in general, Sloan "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations," 25 Brit. Year Bk. of Int. Law 1 (1948).

²⁶ See Jiménez de Aréchaga, *Voting and the Handling of Disputes in the Security Council* 3, 11 ff. (1950); 1 U.N. *Répertoire* 157.

²⁷ 59 Stat. 619; 63 Stat. 734.

aspect of "international constitutional law" or "international administrative law." The writer shares the view of Professor Gooch that legislative rules of procedure possess a true legal character and that this is equally true of the rules of procedure of international organs like the principal organs of the United Nations. In this sense, international parliamentary law may be considered a part of public international law.

PHILIP C. JESSUP

THE END OF AMERICAN CONSULAR JURISDICTION IN MOROCCO

The relinquishment by the United States on October 6, 1956, of its consular jurisdiction in Morocco marks in several respects the end of an era. Not only did the action specifically terminate privileges in the Sharifian Empire which the United States had enjoyed in varying measure for 170 years; the steps taken had also a wider significance, since in effect they extinguished in American law the institution of consular jurisdiction in its classic form. The manner of its passing would seem to deserve at least brief notice in this JOURNAL.

American jurisdiction in Morocco in recent years rested in the first instance on the Moroccan-American treaty of September 16, 1836, which was substantially similar to the original treaty signed in Morocco in 1786.¹ This basic grant was supplemented by rights secured under two multilateral conventions relating to Morocco to which the United States was a party: the Convention of Madrid of July 3, 1880,² and the General Act of Algeiras of April 7, 1906.³ Former American claims to a still wider jurisdiction, based on custom and usage and through a most-favored-nation clause in Moroccan treaties with other states which were no longer in force, were declared untenable in proceedings before the International Court of Justice in 1952.⁴ As one result of these proceedings, American jurisdiction in Morocco after 1952 was confined in practice to cases between Americans—the original grant made in the 1836 treaty—although the theoretical jurisdiction under the Act of Algeiras and the Convention of Madrid was somewhat more extensive. In the Tangier Zone the United States not only maintained its own extraterritorial jurisdiction, but also from 1953 onwards participated in the mixed judicial system established there.⁵

With the trend of events in Morocco pointing definitely to its complete independence in the immediate future, the Department of State in January, 1956, declared it to be the policy of the United States to relinquish its jurisdictional rights there at the appropriate time.⁶ To accomplish this

¹ 2 Miller, *Treaties of the United States* 185; 4 *ibid.* 33.

² 1 Malloy, *Treaties of the United States* 1220; 6 A.J.I.L. Supp. 18 (1912).

³ 2 Malloy, *op. cit.* 2157; 1 A.J.I.L. Supp. 47 (1907).

⁴ Case concerning Rights of Nationals of the United States of America in Morocco (France v. the United States), [1952] I.C.J. Rep. 176; 47 A.J.I.L. 136 (1953).

⁵ U. S. Treaty Series, No. 2893; G. H. Stuart, *The International City of Tangier* 166-167 (2d ed., 1955).

⁶ 34 Department of State Bulletin 204 (1956). This policy had been foreshadowed in the United States pleadings before the International Court.

and two possible courses were open to the Department: either to seek a revision of the treaty terms through negotiations with the Moroccan Government, or to obtain prior Congressional approval for the President to renounce American jurisdictional rights unilaterally at such time as he might deem appropriate. The latter alternative was the one selected, and draft legislation embodying the views of the Department was sent to the Senate in March, 1956.

Three hearings on the subject were subsequently held by the Senate Committee on Foreign Relations, at which Mr. George V. Allen, Assistant Secretary for Near Eastern, South Asian, and African Affairs, and other officials appeared on behalf of the Department. In their testimony two principal reasons were advanced to support the choice of the legislative rather than the treaty method of termination. The first was that it was in accord with precedent: In 1874, the President had sought and received Congressional approval in advance to "suspend" such part of American consular jurisdiction in Egypt as might be taken over by the Mixed Courts then being planned.⁷ The second reason was that by the same Congressional action the statutory provisions governing the exercise of consular jurisdiction could also be repealed, thus clearing the statute book tidily of obsolete matter. Other influential factors in the choice of method may have been a desire to retain unilateral control over the precise time of relinquishment, and perhaps a desire not to open the door at that moment to possible sweeping revisions of Moroccan-American treaty arrangements in general.

The only opposition to the proposals voiced before the Committee came from Mr. Robert Emmet Rodes, representing various groups of American residents and businessmen in Morocco. He submitted that relinquishment would have the effect in fact of putting Americans in Morocco in a less favorable position than nationals of other states, particularly those of France and Spain; and further, that a modification of treaty terms could be accomplished Constitutionally only by renegotiation and subsequent ratification with Senate advice and consent. The Department persuasively rebutted the validity of these contentions, but perhaps its most telling point was the fact that the treaty of 1836 by its terms could be denounced by either party on one year's notice. Since Morocco could thus destroy at will the cornerstone of American jurisdiction, such jurisdiction could obviously not be maintained for long in any case in the face of Moroccan opposition.

The Foreign Relations Committee, agreeing with the Department, reported favorably to the Senate on the proposed joint resolution.⁸ Passed

⁷ Act of March 23, 1874, 18 Stat. 23, 22 U.S.C. sec. 182. The authority granted was exercised by the President in 1876 and again in 1937, when the original regime of the Mixed Courts was replaced by the transitional regime established by the Montreux Convention of that year. ² Hackworth, *Digest of International Law* 516. But it may be noted that a recent precedent existed for the use of the treaty method: the Chinese-American treaty of Jan. 11, 1943, relinquishing American extraterritorial rights in China. U. S. Treaty Series, No. 984; 37 A.J.I.L. Supp. 65 (1943). This was not referred to during the hearings.

⁸ S.Rep. 2274, 84th Cong., 2d Sess.

in due course by the Senate and the House of Representatives, it became law on August 1, 1956.⁹ As adopted, its text reads as follows:

Whereas the laws of the United States invest the ministers and consuls of the United States in certain countries, including Morocco, with judicial authority so far as the exercise of the same is allowed by treaty with such countries and in accordance with usage in such countries; and

Whereas the consuls of the United States in Morocco are permitted to exercise jurisdiction over American nationals under the treaty between the United States and Morocco signed September 16, 1836, and the Act of Algeciras signed April 7, 1906; and the [*sic*; to?] exercise by custom and usage the same jurisdiction over subjects of Morocco or others who may be designated as "proteges" under the Convention of Madrid signed July 3, 1880; and

Whereas Morocco is now the only foreign country where the consuls of the United States exercise such jurisdiction; and

Whereas it is the policy of the United States to discontinue the exercise of extraterritorial jurisdiction in Morocco at such time as it becomes appropriate: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the relinquishment by the President, at such time as he considers this appropriate, of the consular jurisdiction of the United States in Morocco is hereby approved and sections 1693, 4083 to 4091, inclusive, 4097 to 4122, inclusive, and 4125 to 4130, inclusive, of the Revised Statutes, as amended, are repealed effective upon the date which the President determines to be appropriate for the relinquishment of such jurisdiction, except so far as may be necessary to dispose of cases then pending in the consular courts in Morocco.

With Congressional approval thus secured, American jurisdictional rights in Morocco under the treaties referred to were formally relinquished on October 6, 1956, effective the same day.¹⁰ Later the same month an international conference at Tangier, in which the United States took part, recognized the abolition of the international regime of the Tangier Zone and the full reinstatement of the Sultan's authority therein.¹¹

So much for the history of the relinquishment of American rights in Morocco. But it will be noticed that the Congressional resolution quoted above went beyond mere approval of that action. It also repealed in their entirety those sections of the Revised Statutes which governed the exercise of consular jurisdiction not only in Morocco, but in all countries where the United States had acquired such jurisdiction by treaty and usage.¹² As indicated in the preamble, this was done because Morocco was the only

⁹ Public Law 856, 84th Cong., 2d Sess.; 70 Stat. 773.

¹⁰ See note addressed by the American Ambassador at Rabat to the Moroccan Foreign Minister, 35 Dept. of State Bulletin 844 (1956) reprinted below, p. 466.

¹¹ Final Declaration of the Conference, Oct. 29, 1956. T.I.A.S., No. 3680; 35 Department of State Bulletin 842 (1956); reprinted below, p. 460.

¹² The sections of the Revised Statutes specified in the resolution correspond to 22 U.S.C. secs. 141-143, 145-174, 176-181, and 183 inclusive.

NOTES AND COMMENTS

CORNELL UNIVERSITY SUMMER CONFERENCE ON INTERNATIONAL LAW

Dean Gray Thoron of the Cornell Law School and Professor Rudolf B. Schlesinger, Chairman of the School's Committee on International Legal Studies, have announced plans for the first Summer Conference on International Law to be held in Ithaca, N. Y., June 26-29, 1957. The conference will be part of the Law School's international legal studies program, which is supported by a grant received from the Ford Foundation. The general topic will be "International Law in Progress—Viewed by Government Official, Private Practitioner and Professor."

The purpose of the conference will be to bring together representatives of government, private practice and teaching to discuss matters of current interest in international law. There will be talks by eminent figures in the field and plenary sessions will deal with legal problems under the headings of Law and Commerce, Military Affairs, Transport and Communication, International Judicial Co-operation, presented by specialists in each area. There will be opportunity for discussion from the floor and smaller round tables.

The conference will be open to all who are interested. There will be facilities for recreation in the vicinity of Ithaca, which is a lovely place to spend a few days in June. Inquiries may be addressed to Professor Felix H. Cardozo, Myron Taylor Hall, Ithaca, N. Y., who is in charge of arrangements. M.H.C.

A SCHOOL OF INTERNATIONAL SERVICE

Plans are being developed, and are, indeed, well on their way, for a new International Service under the auspices of The American University in Washington. President Hurst R. Anderson has taken the initiative lead in this matter and Bishop E. Bromley Oxnam, a Trustee of the University, is also

not to be a foreign service school but to be mainly a school of the preparation of selected personnel for international service. It will offer service, education—both technical assistance, trade and journalism and communication—and administration, health, and so on, all on the international level. The school will be of area studies dealing with the problems of the area. The school has been working on personnel problems.

Over a million dollars in funds have been secured for the construction of a new building, and for operating expenses, library expansion, and other items. The School is to be formally opened in September, 1958, although a transition program is already in effect whereby students may make use of the many courses given at The American University in various fields of international relations to get started on their work toward Bachelor's, Master's or Doctor's degrees in the School. Dr. Mary E. Bradshaw, Acting Chairman of the Department of International Relations of the University, is directing the counseling of students at the present time.

P. B. P.

FIFTY-FIRST ANNUAL MEETING OF THE SOCIETY
APRIL 25-27, 1957

HOTEL STATLER, WASHINGTON, D. C.

ADVANCE PROGRAM

THURSDAY, APRIL 25, 1957

10:00 a.m.—Ohio Room

Meeting of Executive Council

1:00 p.m.—Congressional Room

Registration for members

2:00 p.m.—Congressional Room

Navigation and Other Uses of International Canals and Ri

Chairman: Louis B. Wehle, *of the New York Bar*

Speakers: Charles E. Martin, *Director, Institute of International
University of Washington*

John G. Laylin, *of the D. C. Bar*

Norman J. Padelford

George A. Finch, *J*

Comparative and International

William L. Griffin,
of State

7:00 p.m.

Registration for members

8:15 p.m.

Address by Lester H. Woolsey

Address by His Excellency Dr.
Secretary of State

FRI

Sou.

Speakers: Ernesto Dihigo, *Director, Inter-American Academy of Comparative and International Law*

Quincy Wright, *Professor Emeritus, University of Chicago*

Martin Travis, *Columbia University*

David S. Stern, *University of Miami Law School*

2:00 p.m.

Improving Organization for Collective Security including Alternatives to the Veto Power

man: Edgar Turlington, *Recently Legal Adviser to the Ethiopian Government*

ers: Lawrence D. Egbert, *American University*

Ruth C. Lawson, *Mount Holyoke College*

The Honorable George T. Washington, *Judge, United States Court of Appeals*

5:00 p.m.

INFORMAL RECEPTION FOR OFFICERS AND MEMBERS OF THE SOCIETY
AND THEIR GUESTS

8:15 p.m.

International Law and Agreements Relating to Atomic Weapons and Peaceful Uses of Atomic Energy

Panel Discussion

man: E. Blythe Stason, *Dean, University of Michigan Law School*

members: Clark C. Vogel, *Assistant Director for Operations, Division of International Affairs, Atomic Energy Commission*

Leonard C. Meeker, *Assistant Legal Adviser, Department of State*

William T. Mallison, *Acting Chief, Asian-African Branch, Division of International Affairs, Atomic Energy Commission*

Eric Stein, *University of Michigan Law School*

SATURDAY, APRIL 27, 1957

South American Room

10:00 a.m.

BUSINESS MEETING

ssion of previous papers

Election of officers

ts of committees

Meeting of Executive Council

7:00 p.m.

ANNUAL DINNER

ling: The President of the Society

esses by: The Honorable Theodore F. Green, *Chairman, Committee on Foreign Relations, United States Senate*

His Excellency Dr. José A. Mora, *Secretary General, Organization of American States*

The Honorable Robert R. Bowie, *Assistant Secretary of State for Policy Planning*

JUDICIAL DECISIONS

BY BRUNSON MACCHESNEY

Of the Board of Editors

Jurisdiction of I.L.O. Administrative Tribunal over dispute between UNESCO and staff members

JUDGMENTS OF THE ADMINISTRATIVE TRIBUNAL OF THE I.L.O. UPON COMPLAINTS MADE AGAINST THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION. I.C.J. Reports, 1956, p. 77. International Court of Justice.¹ Advisory Opinion, October 23, 1956.

Four American citizen employees of UNESCO, holding appointment specified terms, refused in 1953 and 1954 to answer questionnaires from to appear before, the International Organizations Employees Loyalty Board of the U. S. Civil Service. On July 6, 1954, the Director General of UNESCO had issued an Administrative Memorandum on renewal of appointments in which he declared that he had decided that:

all professional staff members whose contracts expire between now June 30th, 1955 (inclusive), and who have achieved the required standards of efficiency, competence and integrity and whose services needed, will be offered one-year renewals of their appointments.

Thereafter the Director General informed the employees in question that he would not offer them a new appointment, since he could not accept the employee's "conduct as being consistent with the high standards of integrity which are required of those employed by the Organization." The UNESCO Appeals Board expressed the opinion that the decision of the Director General should be rescinded. Upon his refusal to rescind, the employees brought their cases before the I.L.O. Administrative Tribunal, whose jurisdiction over disputes with staff members had been accepted by UNESCO. In decisions of April 26 and October 29, 1955, the I.L.O. Administrative Tribunal ruled that it had jurisdiction with respect to these failures to renew term contracts, and gave judgment on the merits for the employees.

Article XII of the Statute of the I.L.O. Administrative Tribunal provides that, in case the Executive Board of UNESCO (or other organizations using the Tribunal),

challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive

¹ Composed, for this case, of President Hackworth, Vice President Badawi, and Judges Basdevant, Winiarski, Zoričić, Klaestad, Read, Armand-Ugon, Kojevnikov, Zafrulla Khan, Lauterpacht, Moreno Quintana and Córdova.

board concerned, for an advisory opinion, to the International Court of Justice.

2. The opinion given by the Court shall be binding.

resolution of November 18, 1955, the Executive Board of UNESCO had to challenge the decisions of the Administrative Tribunal, and by action of November 25, 1955, quoting Article XII of the Statute, asked the International Court of Justice for an advisory opinion on the legal questions:

I.—Was the Administrative Tribunal competent, under Article II of its Statute,² to hear the complaints introduced against the United Nations Educational, Scientific and Cultural Organization on 5 February 1955 by Messrs. Duberg and Leff and Mrs. Wilcox, and on 28 June 1955 by Mrs. Bernstein?

II.—In the case of an affirmative answer to question I:

(a) Was the Administrative Tribunal competent to determine whether the power of the Director-General not to renew fixed-term appointments has been exercised for the good of the service and in the interest of the Organization?

(b) Was the Administrative Tribunal competent to pronounce on the attitude which the Director-General, under the terms of the Constitution of the United Nations Educational, Scientific and Cultural Organization, ought to maintain in his relations with a Member State, particularly as regards the execution of the policy of the Government authorities of that Member State?

III.—In any case, what is the validity of the decisions given by the Administrative Tribunal in its Judgments Nos. 17, 18, 19 and 21?

The Court decided, by nine votes to four, "to comply with the Request for an Advisory Opinion." It was of opinion, ten to three, on Question I:

that the Administrative Tribunal of the International Labour Organisation was competent, under Article II of its Statute, to hear the complaints introduced against the United Nations Educational, Scientific and Cultural Organization on February 5th, 1955, by Messrs. Duberg and Leff and Mrs. Wilcox, and on June 28th, 1955, by Mrs. Bernstein.

On Question II the Court decided, nine to four, "that this question does not require an answer by the Court." On Question III it decided, ten to three,

that the validity of the decisions given by the Administrative Tribunal in its Judgments Nos. 17, 18, 19 and 21 is no longer open to challenge.

Considering whether to "comply with the Request for an Opinion," the Court said:

Article II, par. 5, reads: "The Tribunal shall also be competent to hear complaints of non-observance, in substance or in form, of the terms of appointment of officials, of the provisions of the Staff Regulations of any other intergovernmental international organization approved by the Governing Body which has addressed to the Director-General a declaration recognising, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure." UNESCO had accepted the jurisdiction and Rules of Procedure of the Tribunal.

The question put to the Court is a legal question. It arose within the scope of the activities of Unesco when the Executive Board had to examine the measures to be taken as a result of the four Judgments. The answer given to it will affect the result of the challenge raised by the Executive Board with regard to these Judgments. In submitting the Request for an Opinion the Executive Board was seeking a clarification of the legal aspect of a matter with which it was dealing.

Under Article XII of the Statute of the Administrative Tribunal, the Opinion thus requested will be "binding." Such effect of the Opinion goes beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion. However, the point in question is nothing but a rule of conduct for the Executive Board determining the action to be taken by it on the Opinion of the Court. It in no wise affects the way in which the Court functions that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion, the content of the Opinion itself. Accordingly, the fact that the Court of the Court is accepted as binding provides no reason why the Court for an Opinion should not be complied with.

The Court is a judicial body and, in the exercise of its judicial functions, it is bound to remain faithful to the requirements of its judicial character. Is that possible in the present case?

The four Judgments referred to in the Request for an Opinion under Article VI, paragraph 1, of the Statute of the Tribunal, and without appeal." However, Article XII, paragraph 1, of the Statute, in so far as it was relied upon by Unesco, confers upon the Executive Board the right to challenge "a decision of the Tribunal confirming its jurisdiction" and provides that the Executive Board shall submit its challenge to the Court by means of a Request for an Advisory Opinion. The Executive Board has availed itself of this right.

The advisory procedure thus brought into being appears as such, in a way, the object of an appeal against the four Judgments, seeing that the Court is expressly invited to pronounce, in its Opinion, which will be "binding," upon the validity of these Judgments.

Article XII of the Statute of the Administrative Tribunal was designed to provide that certain challenges relating to the validity of Judgments rendered by the Tribunal in proceedings between an official and the international organization concerned should be brought before the Court and decided by it. However, under Article 34, paragraph 1, of the Statute of the Court "only States may be parties in cases before the Court." In Article XII it was sought to avoid this difficulty while nevertheless securing an examination by and a decision of the Court by means of a Request, emanating from the Executive Board, for an Advisory Opinion. To the Executive Board—and to it alone—was given the right of challenging a Judgment of the Administrative Tribunal. The special feature of this procedure is that advisory proceedings take the place of contentious proceedings which would not be possible under the Statute of the Court.

The Court is not called upon to consider the merits of such a procedure or the reasons which led to its adoption. It must consider only the question whether its Statute and its judicial character do or do not stand in the way of its participating in this procedure by complying with the Request for an Advisory Opinion.

According to generally accepted practice, legal remedies against a judgment are equally open to either party. In this respect each

possesses equal rights for the submission of its case to the tribunal called upon to examine the matter. This concept of the equality of parties to judicial proceedings finds, in a different sphere, an expression in Article 35, paragraph 2, of the Statute of the Court which when providing that the Security Council shall lay down the conditions under which the Court shall be open to States not parties to the Statute, adds "but in no case shall such conditions place the parties in a position of inequality before the Court." However, the advisory proceedings which have been instituted in the present case involve a certain absence of equality between Unesco and the officials both in the origin and in the progress of those proceedings.

In the first place, in challenging the four Judgments and applying to the Court, the Executive Board availed itself of a legal remedy which was open to it alone. Officials have no such remedy against the Judgments of the Administrative Tribunal. Notwithstanding its limited scope, Article XII of the Statute of the Administrative Tribunal in this respect confers an exclusive right on the Executive Board.

However, the inequality thus stated does not in fact constitute an inequality before the Court. It is antecedent to the examination of the question by the Court. It does not affect the manner in which the Court undertakes that examination. Also, in the present case, the absence of equality between the parties to the Judgments is somewhat nominal since the officials were successful in the proceedings before the Administrative Tribunal and there was accordingly no question of any complaint on their part. This being so, it is not necessary for the Court to express an opinion upon the legal merits of Article XII of the Statute of the Administrative Tribunal. The Court must confine itself to the facts of the present case. In this respect, it is enough for it to state that the circumstance that only the Executive Board was entitled to institute the present proceedings does not constitute a reason for not complying with the Request for an Advisory Opinion.

The question of equality between Unesco and the officials arises once more in connexion with the actual procedure before the Court. Here the absence of equality flows not from any provision of the Statute of the Administrative Tribunal but from the provisions of the Statute of the Court. In the form of advisory proceedings, the Court has before it a challenge the result of which will affect the right of the officials to the benefit of the Judgments of the Tribunal and the obligation of Unesco to comply with them. The judicial character of the Court requires that both sides directly affected by these proceedings should be in a position to submit their views and their arguments to the Court.

In the case of Unesco, the Statute and the Rules of Court constitute no obstacle in this respect. Indeed, they make available to it the necessary facilities. In the case of the officials, the position is different.

It was with that difficulty that the Court was confronted. The difficulty was met, on the one hand, by the procedure under which the observations of the officials were made available to the Court through the intermediary of Unesco and, on the other hand, by dispensing with oral proceedings. The Court is not bound for the future by any consent which it gave or decisions which it made with regard to the procedure thus adopted. In the present case, the procedure which has been adopted has not given rise to any objection on the part of those concerned. It has been consented to by counsel for the officials in whose favour the Judgments were given. The principle of equality of the parties follows from the requirements of good administration of

justice. These requirements have not been impaired in the present case by the circumstance that the written statement on behalf of the officials was submitted through Unesco. Finally, although no oral proceedings were held, the Court is satisfied that adequate information has been made available to it. In view of this there would appear to be no compelling reason why the Court should not lend its assistance in the solution of a problem confronting a specialized agency of the United Nations authorized to ask for an Advisory Opinion of the Court. Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the régime established by the Statute of the Administrative Tribunal for the judicial protection of officials. Any seeming or nominal absence of equality ought not to be allowed to obscure or to defeat that primary object.

In the light of what has been said above and of the circumstances of the present case, the Court considers that it ought to comply with the Request for an Opinion.

Pointing out that under Article XII of the Statute the Advisory Opinion requested was to examine only the jurisdiction and not the merits of the Tribunal's decision, the Court continued:

. . . The circumstance that the Tribunal may have rightly or wrongly adjudicated on the merits or that it may have rightly or wrongly interpreted and applied the law for the purposes of determining the merits, in no way affects its jurisdiction. The latter is to be judged in the light of the answer to the question whether the complaint was one the merits of which fell to be determined by the Administrative Tribunal in accordance with the provisions governing its jurisdiction. That distinction between jurisdiction and merits is of great importance in the legal regime of the Administrative Tribunal. Any mistakes which it may make with regard to its jurisdiction are capable of being corrected by the Court on a Request for an Advisory Opinion emanating from the Executive Board. Errors of fact or of law on the part of the Administrative Tribunal in its Judgments on the merits cannot give rise to that procedure. The only provision which refers to its decisions on the merits is Article VI of the Statute of the Tribunal which provides that its judgments shall be "final and without appeal."

Before the Administrative Tribunal the officials concerned complained of the refusal to renew their fixed-term contracts, a refusal which they encountered in the circumstances as recalled. They challenged before the Appeals Board the argument that the holder of a fixed-term contract had no right to the renewal of his contract. They alleged that, on the contrary, they had an acquired right to the renewal of their contracts. In doing so they relied, apart from general considerations relating to the international civil service and the practice of international organizations, on the position taken with regard to the renewal of fixed-term contracts by the Director-General in the Administrative Memorandum of July 6th, 1954, and on a document submitted by him to the General Conference which refers, in this connexion, to Staff Regulation 4.5.1. Their position, on this point, before the Administrative Tribunal appears clearly when it is borne in mind that they had been successful before the Appeals Board and that the latter, on this point, had given as a reason for its opinion the meaning which it attached to Staff Regulation 4 and to Staff Rule 52. On the other hand, the written answer of Unesco, in challenging the case for the complainants, relied on the interpretation which it put

upon Staff Regulation 4.5.1, on certain provisions of the Staff Rules, and, primarily, on the meaning which it attributed to fixed-term contracts. All this serves to bring out the issue of which the Administrative Tribunal was seised. The Court has to consider whether the examination of these complaints fell within the jurisdiction of the Administrative Tribunal under Article II, paragraph 5, of its Statute which provides: "The Tribunal shall . . . be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations. . . ."

. . . In order to admit that the Tribunal had jurisdiction, it is sufficient to find that the claims set out in the complaint are, by their nature, such as to fall within the framework of Article II, paragraph 5, of the Statute of the Administrative Tribunal. . . .

According to the words of this provision, it is necessary, in order to establish the jurisdiction of the Tribunal to hear a complaint by an official, that he should allege non-observance of the terms or provisions therein referred to . . . in applying Article II, paragraph 5, the Court considers . . . that it is necessary that the complaint should indicate some genuine relationship between the complaint and the provisions invoked, but that it is not required that the facts alleged should necessarily lead to the results alleged by the complainants. Any such requirement would confuse the question of jurisdiction with that of substance.

In the cases here in question, the officials put forward an interpretation of their contracts and of the Staff Regulations to the effect that they had a right to the renewal of their contracts. They alleged that the Administrative Memorandum was complementary to their contracts and to the Staff Regulations and that it gave them a legal right to renewal. The correctness of these allegations constitutes the substance of the issue which they submitted to the Tribunal. In order to determine the jurisdiction of the Tribunal, it is necessary to ascertain whether the terms and the provisions invoked appear to have a substantial and not merely an artificial connexion with the refusal to renew the contracts. . . .

* * * * *

In the practice of Unesco—as well as in the practice of the United Nations and of the Specialized Agencies—fixed-term contracts are not like an ordinary fixed-term contract between a private employer and a private employee. At the crucial period a large number of the employees of Unesco held fixed-term contracts. A similar situation seems to have obtained in the United Nations and in the Specialized Agencies. There is no need here to go into the reasons which have prompted that form of contracts. The fact is that there has developed in this matter a body of practice to the effect that holders of fixed-term contracts, although not assimilated to holders of permanent or indeterminate contracts, have often been treated as entitled to be considered for continued employment, consistently with the requirements and the general good of the organization, in a manner transcending the strict wording of the contract. . . . The practice as here surveyed . . . lends force to the view that there may be circumstances in which the non-renewal of a fixed-term contract provides a legitimate ground for complaint.

The practice referred to above should serve as a warning against an interpretation of the contract of employment which, by considering exclusively the literal meaning of its provision relating to duration, would mean that on the expiry of the fixed period a fixed-term contract cannot be relied upon for the purpose of impugning a refusal to renew

it. Such an interpretation, moreover, would fail to take into account the nature of renewal as understood in the Staff Regulations to which the contract expressly refers.

Discussing the Staff Regulations and the use of the term "renewal," the Court added:

All this shows that there is a relationship, a legal relationship, between the renewal and the original appointment and, consequently, between the renewal and the legal position of an official at the moment when his claim to renewal is granted or denied. Does that relationship go so far as to create in his favour, as has been claimed, a definite right to renewal? That is a question which pertains to the merits and which it is not necessary for the Court to answer. It is sufficient to note that the complaint of the appellant was related to the link created between the original contract and its renewal—a link clearly established by the Staff Regulations and Rules to which the contract expressly makes reference and which constitute the legal basis on which the interpretation of the contract must rest. Thus the complainant, in claiming to possess a right to renewal of his contract and in claiming that that right had been infringed, was placing himself on the ground of non-observance of the terms of appointment.

The legal relationship thus found to exist between a fixed-term contract and its renewal—a relationship which constitutes the legal basis of the complaints of the officials—shows itself once more in the decision taken by the Director-General in the Administrative Memorandum of July 6th, 1954.

In this Memorandum the Director-General announced that he had "decided that all professional staff members" who satisfied certain conditions and whose services were needed would "be offered one-year renewals of their appointments." . . . The Court considers that it could reasonably be maintained that an administrative notice framed in such general terms might be regarded as binding on the Organization; and that the necessity, asserted by Unesco, of an individual offer and an individual acceptance of the offer was, in the circumstances, a matter of form rather than of substance. It is not necessary for the Court to decide whether the legal consequences thus envisaged actually followed from the Administrative Memorandum. In any case, the Court considers that if the Director-General thought fit to refuse to an official the benefit of the general offer thus extended, any dispute which might arise with regard to the matter fell within the jurisdiction of the Administrative Tribunal.

It follows from the preceding considerations that the Administrative Tribunal was entitled to assume that the complaints required it to adjudicate on an alleged non-observance of the terms of appointment, and, consequently, to declare itself competent to hear them.

The Court further found that the Staff Regulations were sufficiently involved in the controversy for the Administrative Tribunal to find that the dispute was one "concerning the interpretation and application of the Staff Regulations and Rules of the defendant Organisation." On both grounds, the Tribunal had jurisdiction.

As for Question II, the Court said:

There is no reference in Question II either to a fundamental fault of procedure or to the decision of the Tribunal confirming its jurisdiction. This is so although the two parts of that question are formulated in terms of "competence." For these are questions relating to

the reasons given by the Tribunal for its decision on the merits of the question submitted to it. The reasons given by the Tribunal for its decision on the merits, after it confirmed its jurisdiction, cannot properly form the basis of a challenge to the jurisdiction of the Tribunal. . . . The Statute of the Administrative Tribunal could have provided for other reasons for challenging the decision of the Tribunal than those referred to in Article XII. It has not done so. In view of this, the Court cannot answer Question II within the framework of Article XII of the Statute of the Tribunal—the only Article by reference to which the Opinion of the Court is invoked.

Undoubtedly, Unesco has the general power to ask for an Advisory Opinion of the Court on questions within the scope of its activity. But the question put to the Court has not been put in reliance upon the general power of Unesco to ask for an Advisory Opinion. It has been expressly linked with Article XII.

As for Question III, the Court stated:

Under Article VI of the Statute of the Administrative Tribunal, its judgments "shall be final and without appeal." However, Article XII authorized the Executive Board to challenge those judgments, but only on the ground of lack of jurisdiction or of fundamental fault in the procedure followed. In case of such a challenge, it is for the Court to pass, by means of an Opinion having binding force, upon the challenge thus raised and, consequently, upon the validity of the judgment challenged. The four judgments have been challenged only in respect of the competence of the Administrative Tribunal which rendered them. If the Court had upheld this challenge it would have had to declare the judgments invalid. The Court, having rejected the contention relating to jurisdiction, the only contention raised by the Executive Board, will consequently answer Question III by a finding in favour of the validity of the four judgments.³

Foreign confiscatory nationalization decree—effect on assets within state of forum—extraterritorial effect against public policy and standing to sue

ZWACK v. KRAUS BROS. & Co. 237 F. 2d 255.

U.S. Ct. A., 2nd Circuit, Oct. 2, 1956. Hincks, Ct. J.

Appeal in action by claimed partners in Hungarian firm for injunctive relief, damages, and accounting for profits from former U.S. distributor continuing to act for nationalized Hungarian firm.¹ Plaintiffs claimed to

³ Judges Winiarski, Klaestad and Zafrulla Khan, in separate (but not dissenting) opinions, and Córdova in a dissenting opinion, thought that the Court should not have given any Opinion in response to the request. All of them except Sir Zafrulla Khan (who expressed no opinion on the answers given) indicated their concurrence in the answers of the majority if any Opinion were to be rendered.

Judge Kojevnikov voted to comply with the request for an opinion, and in favor of the decisions on Questions I and III; but in a brief declaration said he could not fully concur in the majority reasoning and that he thought Question II should have been answered in the affirmative.

President Hackworth, Vice President Badawi, and Judge Read gave dissenting opinions, believing the Court right in rendering an opinion, but wrong in its answers to Questions I and III, since they believed that the Administrative Tribunal lacked competence to hear the complaints. In contrast, Judge Córdova's dissent was confined to the point that no opinion should have been given by the Court in what was essentially a controversy between an international organization and individuals.

¹ See decision of court below, digested in 50 A.J.I.L. 431 (1956).

sume as partners on behalf of the firm, although under Hungarian law they had no individual rights in the firm's assets. Defendants argued that plaintiffs had only claim of ownership in firm having exclusive situs in Hungary; that plaintiff's share, having been transferred in Hungary by official action, was not subject to collateral attack even if the transfer was confiscatory and against the public policy of the forum, citing *Underhill v. Hernandez*, 168 U.S. 250; *Banco de Espana v. Federal Reserve Bank*, 2 Cir., 114 F. 2d 438; and *Bernstein v. Van Heyghen Freres Societe Anonyme*, 2 Cir., 163 F. 2d 246, 249. The court on this issue stated (at p. 259):

The plaintiffs base their claim of right to challenge Hungarian ownership of firm assets in the forum on the doctrine that foreign acts of confiscation are presumed to be against the public policy of the forum, *Plesch v. Banque Nationale de la Republique D'Haiti*, 273 App. Div. 224, 77 N.Y.S. 2d 43, affirmed 298 N.Y. 573, 81 N.E. 2d 106, and will not be given extraterritorial effect, *Baglin v. Cusenier Co.*, 221 U.S. 580, 31 S.Ct. 669, 55 L.Ed. 863; *Ingenohl v. Walter E. Olsen & Co.*, 273 U.S. 541, 47 S.Ct. 541, 71 L.Ed. 762; *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 39 S.Ct. 48, 63 L.Ed. 141; *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N.Y. 369, 189 N.E. 456, 91 A.L.R. 1426, absent a treaty or other indication of a public policy to do so, *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796; *United States v. President and Directors of Manhattan Co.*, 276 N.Y. 396, 12 N.E.2d 518. Thus their argument runs that even if Hungarian ownership of the firm is conclusive as to the firm assets in Hungary, the issue of firm ownership is open to collateral inquiry in the United States courts where firm assets having a situs in the forum are concerned.

We think that, where firm assets existing in the forum are concerned, technical considerations as to the manner in which the foreign state seeks to expropriate them are not controlling. Prior to confiscation the assets of the firm both here and in Hungary were equitably owned by the plaintiffs as the sole partners in the firm. It is clear that the Hungarian government could not directly seize the assets which have a situs in the state of the forum. To allow it to do so indirectly through confiscation of firm ownership would be to give its decree extraterritorial effect and thereby emasculate the public policy of the forum against confiscation. This we decline to do. See 57 Yale Law Journal 108. We sustain the plaintiffs' standing to bring and prosecute the complaint here involved.

After disposing of several trial issues, the court came to the crucial question of confiscation or voluntary sale. On this issue, the court found confiscation, stating (at pp. 260-261), in part:

. . . This issue the court below found favorably to the plaintiffs. We cannot say that the finding was clearly erroneous. There was evidence that in making any nominal transfer of the business to the government the Zwacks were actuated by coercion and fear of political reprisals. The evidence amply supported the finding that there was no substantial consideration for a transfer and that even the nominal consideration was not actually and wholly delivered. It is conceded that since late 1948 the Hungarian government has assumed to act as owner of the business. Whether its claimed ownership resulted from "confiscation," or from a "nationalization" of the business, or from "expropriation" is not important for present purposes. And we may assume

for all present purposes that the Hungarian government has the right and power to enforce its title to assets of the business located in Hungary and its right to the use of the appurtenant trade names and marks in Hungary.

But even so, it does not follow that courts in this country must recognize Hungarian claims of title to property situated in this country or rights with respect to commerce in this country which were acquired only by coercion practiced on the owners without substantial compensation. On the facts of this case we think Judge Palmieri was right in his refusal to recognize rights to trade names so derived and in treating the plaintiffs as the equitable owners. The governing principles are set forth in *Baglin v. Cusenier Co.*, supra. See also *Leonturier v. Rey* [1910] A.C. 262; *Plesch v. Banque Nationale de la Republique D'Haiti*, supra; *United States v. Pink*, supra; *Ingenehl v. Walter E. Olsen & Co.*, supra; *Bernstein v. N.V. Nederlandsche Amerikaansche*, etc., 2 Cir., 210 F.2d 375, modifying 2 Cir., 173 F.2d 71; 57 Yale Law Journal 108. There was neither a finding nor evidence to support a finding that the plaintiffs had abandoned their trade-marks and names. Cf. *Beech-Nut Packing Co. v. P. Levillier & Co.*, 273 U.S. 629, 47 S.Ct. 481, 71 L.Ed. 810. We agree with him that *Societe Vinicole de Champagne v. Mumm Champagne & Importation Co.*, D.C., 10 F.Supp. 289; *Id.*, D.C., 13 F.Supp. 575, is distinguishable and not to the contrary. . . .

Jurisdiction of Federal District Court over airplane death on high seas—admiralty—Warsaw Convention

NOEL v. LINEA AEROPOSTAL VENEZOLANA. 144 F.Supp. 359.

U.S. Dist. Ct., S.D. N.Y., Aug. 22, 1956. Cashin, D. J.

Civil action in Federal District Court for airplane death on the high seas. Plaintiff, after amending complaint, alleged a cause of action on the civil side under the Federal Death on the High Seas Act, 41 Stat. 537, and an additional cause of action under the Warsaw Convention, 49 Stat. (2) 3093 *et seq.* After holding that jurisdiction under the Death Act was exclusively in admiralty, the court stated with respect to the claim under the Warsaw Convention:

The question remains as to whether the Warsaw Convention creates a new cause of action and whether any such newly created cause of action may be brought as a civil action in the District Court. While there was at first some doubt as to whether the Convention was self-executing to any extent, *Choy v. Pan American*,¹ supra, there is no doubt at this time that, at least insofar as the Convention creates a rebuttable presumption of liability upon the happening of the accident, Article 17, and a limitation thereof except upon the showing of wilful misconduct, Article 25, that it is self-executing. Virtually all of the reported cases have not considered the question at issue, apparently because the application of the *lex loci delicti*, with the addition of the Convention presumption and limitation mentioned above, afforded the same rights and liabilities as if a separate cause of action were created. It is obvious, however, that the Convention intended to leave much to the law of the forum. Cf. Articles 21, 25(1), 28(2) and 29(2). There has come to the attention of the Court only three reported cases which considered the instant question—two of these are in the New

¹ U. S. Dist. Ct., S.D.N.Y., 1941, 1941 A.M.C. 483.

York State Court and the holdings are contradictory—*Wyman v. Pan American Airways, Inc.*, 181 Misc. 963, 43 N.Y.S.2d 420, affirmed 267 App. Div. 947, 48 N.Y.S.2d 459, affirmed 293 N.Y. 878, 59 N.E.2d 785, certiorari denied 324 U.S. 882, 65 S.Ct. 1029, 89 L.Ed. 1432, holding that no separate cause of action was created by the Convention, and *Salamon v. Koninklijke Luchtvaart Maatschappij, N.V.*, Sup., 107 N.Y.S. 2d 768, affirmed 281 App. Div. 965, 120 N.Y.S.2d 917, leave to appeal denied 282 App. Div. 683, 122 N.Y.S.2d 818, reargument denied 282 App. Div. 837, 124 N.Y.S.2d 342, holding that one was. It is not necessary, however, for the Court to consider which of these holdings is sound since the Court of Appeals for the Second Circuit has settled the issue in the case of *Komlos v. Compagnie Nationale Air France*, 1953, 209 F.2d 436.

The accident giving rise to the *Komlos* suit occurred on the Island of San Miguel, Azores, Republic of Portugal. The Convention concededly was applicable. Decedent's mother received a notice of compensation award from the Insurance Company. Subsequently both the Insurance Company and the decedent's sister, as administratrix of his estate, instituted suit based on the wrongful death. The District Court for the Southern District of New York, S.D.N.Y. 1952, 111 F.Supp. 393,² at pages 401-402, held that the Warsaw Convention applied but that it created no substantive cause of action, at least so long as the *lex loci delicti* provided such a cause, and that the cause of action was assigned, by operation of New York law, to the Insurance carrier because suit had not been instituted by the beneficiary of the compensation award within the time limited. The Court of Appeals reversed the latter holding on the ground that the Portuguese law allows the collection of "moral damages," a concept unknown to law of New York. This portion of the cause of action, it was held, could not have been intended to be assigned, as a matter of New York law, to the Insurance Company. To avoid splitting a cause of action it was held that the entire cause should be brought by the Administratrix. It was thus clearly held that the *lex loci delicti* was to be applied by the District Court even though the Warsaw Convention was applicable.

It should be noted that the ends the plaintiffs seek to gain by utilizing the civil rather than the admiralty side of the Court are (1) a jury trial; (2) broader discovery proceedings, and (3) the probability of a less expensive litigation proceeding. It is not contended that the admiralty forum would deny to the plaintiffs their substantive cause of action for wrongful death. Nowhere in the Convention is there any language which can be read to assure any of the advantages sought by the plaintiffs.

The motion to dismiss the complaint on the grounds that the Court does not have jurisdiction of the subject matter of the suit as a civil action, is granted. . . .

Diplomatic and consular immunity—effect on jurisdiction over consul of subsequent appointment as United Nations Representative—views of Department of State

ARCAYA v. PAEZ. 145 F.Supp. 464

U. S. Dist. Ct., S.D. N.Y., Oct. 15, 1956. Dimock, D. J.

Libel action by citizen of Venezuela against Venezuelan Consul General in New York who, after suit was commenced, was named Alternate Repre-

² Decision digested in 47 A.J.I.L. 713 (1953).

representative of the Venezuelan Delegation before the United Nations. On motion to dismiss, the court, after holding that such a representative has the status of a diplomatic envoy by virtue of the Headquarters Agreement, 61 Stat. 756, stated in part:

Putting aside for the present the motion to dismiss for failure to state a claim, defendant raises questions of two kinds: the question of jurisdiction of the court over suits against diplomatic representatives and the question of the immunity of diplomatic representatives even though the court may have jurisdiction.

On the question of jurisdiction, the power of the District Court to entertain an action against a consul seems to be conceded, as indeed it must be perforce section 1351 of title 28 of the United States Code. The power to entertain actions against "ambassadors or other public ministers of foreign states * * * not inconsistent with the law of nations" is, however, vested exclusively in the Supreme Court by section 1251.

On the question of immunity, a consul is not immune from suit except when the action is based upon acts which he has committed within the scope of his duties. *The Anne*, 3 Wheat. 435, 445, 4 L.Ed. 428; *The Sao Vicente*, 260 U.S. 151, 155, 43 S.Ct. 15, 67 L.Ed. 179; *Lyden v. Lund*, D.C. N.D. Cal., S.D., 32 F.2d 308; *Carl Byoir & Associates v. Tsune-Chi Yu*, 2 Cir., 112 F.2d 885, 886; *Carrera v. Carrera*, 81 U.S. App. D.C. 333, 174 F.2d 496, 498.

An ambassador or minister is, however, absolutely immune from suit even though it be based upon personal transactions. *Magdalena Steam Navigation Company v. Martin*, 2 El. & El. 94.

The court must, of course, determine its own jurisdiction without reference to the views of the Department of State. The questions of the diplomatic status enjoyed by a given defendant and the immunity to be accorded him are, however, questions where a determination of the Department of State is binding upon the court. *United States of Mexico v. Schmuck*, 293 N.Y. 264, 56 N.E.2d 577.

Having stated these principles, I return to the record in the particular case. The complaint alleges that, while plaintiff was exiled from Venezuela for political reasons, defendant publicized certain Venezuelan newspaper articles therein quoted which reflect unfavorably on the political, professional, social and moral standing of plaintiff. This is alleged to have been accomplished by posting in the consulate, by circularization to its mailing list and by personal distribution to visitors to the consulate and others.

When the action was commenced on March 16, 1956, defendant's only office under the Government of Venezuela was consul general. Nevertheless he communicated with the Venezuelan Ambassador in Washington and, as a result, the Venezuelan Ambassador wrote the Secretary of State a letter, dated April 10, 1956, requesting that the Department of State suggest to this court that the suit should be dismissed upon a plea of immunity on behalf of the Government of Venezuela. By a letter dated three days later, the Minister of Foreign Relations of Venezuela advised defendant, that, by order of the President and by order of that Ministry, defendant had been appointed Alternate Representative of the Delegation of the Republic of Venezuela before the United Nations with a rank of Envoy Extraordinary and Minister Plenipotentiary.

Upon the argument of the instant motion on May 17, 1956, the United States Attorney presented a copy of the letter of April 10,

1956, from the Venezuelan Ambassador to the Secretary of State, above referred to. That letter, it will be remembered, requested a suggestion to this court that the suit should be dismissed upon a plea of immunity on behalf of the Government of Venezuela. The paper was, however, presented to the court with the statement by the United States Attorney that it was transmitted by the Department of State without comment. The letter, having been written before the appointment of defendant as alternate representative of Venezuela at the United Nations, based its plea solely on the position of defendant as consul general. While not covered by the letter, the claim of immunity based on status as a United Nations representative was strongly urged on the argument. At the hearing and thereafter plaintiff submitted affidavits, argument and authorities, including *In re Cloete*, 65 L.T. 102, in support of his position that the appointment should be disregarded as merely colorable and made for the sole purpose of conferring immunity on defendant. Defendant submitted answering material.

On July 6, 1956, I wrote the Secretary of State calling attention to the new contention that was being made and the fact that the Department had expressly withheld comment when immunity was claimed only on a basis of consular status. I inquired whether the Department desired to make any comment to the court in the premises. Both parties to the action thereafter communicated with the Department of State in support of their contentions. On September 17, 1956, Hon. Herman Phleger, the Legal Adviser to the State Department, replied to me by letter which, after referring to the previous correspondence, stated:

"On July 10, 1956, a note, No. 1500, was addressed to the Secretary of State by the Venezuelan Ambassador in Washington. The Ambassador requested the Department of State to suggest to your court the status of immunity of Minister Paez.

"The Department of State desires to submit for your consideration the following comments in the premises:

"1. After the receipt by the Department of notification, dated April 26, 1956, of his appointment by his Government, an identity card was issued to Mr. Paez which he received on May 3, 1956, and which stated that he was entitled to the privileges and immunities set forth in Public Law 357, 80th Congress, approved by the President on August 4, 1947.

"2. The Department of State is of the opinion that the subsequent acquisition by Mr. Paez of diplomatic status would not defeat any jurisdiction with respect to him which may have been acquired on March 16, 1956, by the United States District Court for the Southern District of New York in the action. The Department of State makes no comment on the question of whether the court at that time did in fact acquire jurisdiction over Mr. Paez.

"3. It would appear, however, that Mr. Paez' present status as a diplomatic representative of the Republic of Venezuela to the United Nations may not be questioned and that Mr. Paez is, therefore, at the present time entitled to all the privileges and immunities granted such representatives under Public Law 357, 80th Congress."

I understand from this letter that the questions that the Department undertook to answer were (1) whether subsequent acquisition by defendant of diplomatic status would defeat the court's previously acquired jurisdiction of the subject matter and (2) whether defendant

is entitled to all of the privileges and immunities of a representative to the United Nations. The first is answered in the negative and the second in the affirmative.

I do not feel that I ought to accept without examination a determination by the Department of State that the court did not lose jurisdiction it had theretofore possessed when defendant was appointed representative to the United Nations. The determination that defendant is entitled to the privileges and immunities of the office of representation to the United Nations does, however, conclude me under the doctrine of *Matter of United States of Mexico v. Schnuck*, 204 N.Y. 264, 56 N.E.2d 577, *supra*. The question whether the appointment was colorable is therefore no longer open before me.

That leaves for my decision the question (1) whether the court obtained jurisdiction of the subject matter before defendant's appointment as representative and, if so, the question (2) whether jurisdiction was ousted by that appointment and, if not, the question (3) whether defendant has immunity from this suit as consul and, if not, the question (4) whether one of the immunities of a representative to the United Nations is immunity from further prosecution of a suit begun before the acquisition of status as such representative.

The answer to question one, whether the court obtained jurisdiction of the subject matter, must, as I said above, be in the affirmative. Section 1351 of title 28 of the United States Code expressly gives jurisdiction of suits against consuls to the district courts.

The second question, whether that jurisdiction was ousted by defendant's appointment as representative, was correctly answered in the negative by the Legal Adviser to the Department of State. It is true that the jurisdiction of the Supreme Court over suits against ministers is exclusive under section 1251 of title 28 of the United States Code. It is also true that it has been held (although I have some doubt as to the correctness of the ruling) that the bestowal of the *privileges and immunities* of diplomatic envoys upon representatives to the United Nations, by section 15 of the Joint Resolution of August 4, 1947, above quoted, deprives all courts except the Supreme Court of jurisdiction of suits against them. *Friedberg v. Santa Cruz*, 274 App.Div. 1072, 86 N.Y.S.2d 369. Granting, however, the correctness of that ruling, that the Supreme Court alone would have jurisdiction of a suit originally instituted against a representative to the United Nations, the acquisition of that status by a defendant after the district court had obtained jurisdiction of the subject matter of the suit would not oust the district court of jurisdiction. . . .

[Case discussion omitted.]

I therefore do not believe that defendant's appointment as representative to the United Nations affected the jurisdiction of this court.

The third question, whether defendant was immune when this suit was brought, involves the determination of an issue of fact. The State Department, though requested to suggest this immunity to this court by the Venezuelan Ambassador, merely submitted a copy of his letter without comment. The determination of the question is therefore left to the courts.

As I stated at the beginning of this opinion, a consul is immune from only such suits as are grounded upon transactions within the scope of his official authority. Mr. Justice Story made a classic statement of the law in *The Anne*, 3 Wheat. 435, 445, 4 L.Ed. 428, which was adopted in *The Sao Vicente*, 260 U.S. 151, 155, 43 S.Ct. 15, 67 L.Ed. 179. . . .

[Quotation omitted.]

From that statement we learn that a consul's duties are commercial but that they may be enlarged by special authority. To be effective such an enlargement must, however, "be recognized by the government within whose dominions he assumes to exercise it." The Venezuelan Ambassador here asserted such an enlargement in his letter of April 10, 1956, to the Secretary of State. He said:

"I communicated to Mr. Paez my belief that once the newspapers and the American reading public had been informed of the truth concerning the subject matter of Dr. Arcaya's misrepresentations and concerning Dr. Arcaya's own political history, his baseless complaints and accusations would thenceforth, seen in proper perspective, lose all credibility and news value.

"It was therefore in pursuance of his duties as a responsible agent of the Republic of Venezuela that Mr. Paez wrote a letter to 'The New York Times' published in the issue of March 12, 1956 and it was also pursuant to those duties that he informed appropriate persons concerning information appearing in the Venezuelan newspapers which served to clarify the matters involved in Doctor Arcaya's charges. The Government of Venezuela feels not only that it was within the duties of Mr. Paez to do so but that he would have been remiss in carrying out his official instructions had he failed to do so."

If the alleged enlargement of defendant's duties had been "recognized by the government within whose dominions" it was assumed to be exercised, the Department of State would surely have so advised the court instead of submitting the letter without comment.

I must therefore decide the question whether, on the record before me, the acts with which defendant is charged were within his commercial duties. As Judge Lowell said in *Lorway v. Lousada*, D.C.Mass., 15 Fed. Cas. pages 919, 920, No. 8517:

"No doubt our government, in all its departments, is bound to accord to the consul, after the executive authority has received him, the free exercise of all his consular authority, such as may exist by custom, treaty, or general international law. But, after he has done an act professedly official, I see no reason why an individual may not try the question here, whether the act was within the scope of his authority."

I can find nothing to indicate that defendant's alleged acts were within the scope of his authority. I must therefore deny defendant's motion for summary judgment dismissing the case insofar as the motion is based upon diplomatic immunity of defendant as consul general.

That leaves the fourth and final question, whether defendant's immunity as a "diplomatic envoy," conferred by virtue of his status as representative to the United Nations under the terms of section 15 of the Joint Resolution of August 4, 1947, prevents the prosecution of this action against him.

This involves a question which, so far as revealed by the researches of any of those concerned, is novel: where a court has acquired jurisdiction over a defendant, what is its duty when that defendant obtains diplomatic immunity?

It is clear that the court may not issue its process against such a defendant so long as he retains his diplomatic immunity. Section 4063 of the Revised Statutes, 22 U.S.C. § 252, provides: [Quotation omitted.] . . .

This provision is a codification of the act of April 30, 1790, c. 9, § 25, 1 Stat. 117, which was drawn from the statute 7 Anne, c. 12. It, in turn, was declaratory of, and did not alter, the law of nations. In *re Baiz*, 135 U. S. 403, 420, 10 S.Ct. 854, 34 L.Ed. 222, *Magdalena Steam Navigation Company v. Martin*, 2 El. & El. 94, 114, *supra*.

In the latter case Lord Campbell had occasion to discuss the nature of diplomatic immunity under the law of nations. There the Envoy Extraordinary and Minister Plenipotentiary of the Republic of Guatemala and New Granada was sued upon a cause of action which accrued after he had acquired that status. In granting judgment for the defendant, Lord Campbell said, p. 111, "The great principle is to be found in Grotius de Jure Belli et Pacis, 2, c. 18, s. 9, 'Ornis curatio abesse a legato debet,'" and added at pp. 113-114: [Quotation omitted.] . . .

Lord Campbell was thus of the opinion that the immunity of ambassadors was not limited to freedom from service of process. He regarded the ambassador's protection from the necessity of retaining an attorney in an action for libel, of subpoenaing witnesses for his defense and of personally attending the trial where he might be needed to instruct his legal advisors, as part of the protection to which he was entitled under the law of nations. No one has suggested that any court has ever held otherwise or suggested any good reason why a court should do so.

I am clear therefore that this action should not at present be permitted to proceed against this defendant. I do not believe, however, that the action should be dismissed. If the summons had been served on defendant after he had attained the rank of a diplomatic envoy he would have been the victim of an unlawful act upon which plaintiff could base no rights. Here, however, plaintiff has lawfully served a summons on him. By that act plaintiff obtained at least two valuable rights: the right to prosecute the action without further service of process and the right to prosecute the action despite the subsequent expiration of the period limited for the institution of an action for libel. Must plaintiff lose these rights because of defendant's promotion? I see no reason for such a deprivation. It will not interfere with defendant's efficiency as alternate representative to the United Nations to have the action pend dormant while he fulfills the duties of his new office. If and when defendant loses his status and the immunity that goes with it, plaintiff ought to be allowed to proceed with his action.

Something like that procedure was adopted by Eve, J., in *In re Suarez* [1917] 2 Ch. 131. There the Bolivian Minister had submitted himself to the jurisdiction of the court up to the point where a summons was issued for leave to proceed to execution. At that point he asserted his diplomatic immunity. Mr. Justice Eve held the plea good but added, p. 139, "I think the proper course is to make no order on the summons except that it do stand over generally, with liberty to restore in the event of the defendant ceasing to hold an office to which the immunity he asserts is attached." The minister having ceased his functions, the order was subsequently restored. *Suarez v. Suarez* [1918] 1 Ch. 176.

Though it is probably unimportant, I see no reason for the application here of the rule that extends an ambassador's immunity for the time reasonably necessary to permit him to depart after loss of status. The purpose of that rule is to protect him against the service of process until he gets away. Here he needs no protection against the prosecution of the pending action until he gets away. On the contrary

prosecution of the action while he is here is more favorable to him than prosecution after he has left.

NOTES

Declaratory judgment as remedy to review exclusion order

In *Brownell v. We Shung*, 352 U. S. 180 (U. S. Sup. Ct., Dec. 17, 1956, Clark, J.), it was held that an exclusion order may be reviewed by declaratory judgment as well as *habeas corpus* under the Immigration and Nationality Act of 1952, 8 U. S. C.A. § 1101 *et seq.* The different Constitutional status of the alien seeking admission and the deportee does not change the ruling. The substantive law of review in exclusion cases remains the same. Compare the earlier case of *Shaughnessy v. Pedreiro* (1955), 349 U. S. 48, 75 S.Ct. 591, 99 L.Ed. 868, which held that declaratory judgment procedure was applicable to a deportation order.

Exemption from customs duties—impact of Jay Treaty—absence of implementing legislation

Appellant, a Canadian Indian resident on a Reserve, purchased in the United States an electric washing machine, a second-hand oil burner and an electric refrigerator. Upon entry into Canada they were not reported at the customs office and some time later were seized and held until the duty, amounting to \$123.66, was paid. A petition of right was instituted to recover the money, the claim being based, first, on Article III of the Jay Treaty of 1794, which stipulates:

No duty on entry shall ever be levied by either party on peltries brought by land or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.

Claimant also contended that this article was intended to be perpetual; was thus not affected by the War of 1812 and in any event it was restored by Article 9 of the Treaty of Ghent of 1814.

A second ground for the claim was rested on alleged exemptions contained in S. 102 of the Indian Act R.S.C. 1927 C. 98 and S. 86(1) of R.S.C. 1952 C. 149. The petition was denied in the trial court per Cameron, J., [1955] 4 D.L.R. 760. On appeal, judgment was affirmed.

Kerwin, C. J. C., speaking for himself and Taschereau and Fauteux, JJ., held that inasmuch as the Jay Treaty was not a treaty of peace, the rights and privileges granted to subjects by the treaty were not enforceable in the absence of implementing legislation; furthermore, since no vested property rights were involved, it was unnecessary to consider whether the terms of the Jay Treaty had been abrogated by the War of 1812.

Rand, J., speaking also for Cartwright, J., concurred that the Jay

Treaty was not a treaty of peace. Furthermore, while Article 9 of the Treaty of Ghent restored to the Indian tribes and nations the possessions, rights and privileges which they may have enjoyed in 1811, yet both the Crown and Parliament have treated the provisional arrangements as being replaced by exclusive codes covering new and special rights. *Scoble* changed circumstances have also brought about a termination of the clause.

All judges concurred in the conclusion that no immunity existed under the Indian Act, and Kellock and Abbott, JJ., grounded their conclusion chiefly on this point. *Francis v. The Queen*, [1956] 3 D.L.R. (2) 61 (Canada, S.Ct., June 11, 1956, Kerwin, C. J. C.).^{*}

Sovereign immunity—separate legal entity as component part of sovereign state—law applicable—waiver—submission to jurisdiction in ignorance of rights

Plaintiffs were an Italian company and defendants carried on business in Spain. In 1952 the parties entered into two c.i.f. contracts for the sale of 26,000 tons of rye (estimated value £600,000). Each contract contained a term specifying that the sale was made in accordance with the Genoa international contract for sale of cereals and that "for any divergence which may arise . . . both parties submit to the jurisdiction of the technical courts at London."

Disputes arose and on September 9, 1954, the plaintiffs issued a writ out of the jurisdiction claiming damages for breach of contract. On October 20, 1954, an appearance was entered for the defendants by their solicitor in London. On November 19, 1955, the statement of claim was delivered, and on January 30, 1956, an order was made by consent for security for the defendants' costs in the sum of £150. On April 18, 1956, a summons was issued on behalf of the defendants praying that all further proceedings in the action be stayed and that the writ and statement of claim be set aside on the ground that the defendants were a department of the state of Spain and that that state through its ambassador claimed sovereign immunity. It was admitted by the defendants that they possessed a legal personality, had power to make contracts on their own behalf for the buying and selling of wheat and could sue and be sued in their own name. It was not disputed that, apart from the effect of their incorporation, the defendants would be part of the Ministry of Agriculture of the sovereign state of Spain.

From affidavits submitted in the case it appeared that the head of the defendants had given instructions to the defendants' solicitors to enter appearance and ask for security for costs without the knowledge or authority of the Spanish Minister of Agriculture, to whom the head of the defendants was directly subordinate, and who, apart from the Cabinet or head of the state of Spain, was the only person with authority to decide whether the defendants should submit to the jurisdiction of a foreign court.

The court *per* Parker, L. J., with Jenkins concurring and Singleton, L.

^{*} Digests of this and the following English cases supplied by Prof. Hardy C. Dillard of the Board of Editors.

J., dissenting, held (1) that the defendants were a department of the state of Spain notwithstanding that they were a corporate body imbued with a separate legal personality (entity) and hence they were entitled to claim immunity; and (2) that submission to the jurisdiction was ineffective as a waiver of immunity unless made by a person with knowledge of the right to be waived and with the authority of the foreign sovereign.

Parker, L. J., also declared that whether defendants were a department of the state of Spain depended on Spanish law. In the absence of evidence to the contrary, Spanish law was assumed to be similar to English law and there is no ground in English law for thinking that the mere constitution of a body as a legal personality with the right to make contracts is wholly inconsistent with its status as a department of the sovereign state.

In dissenting, Singleton, L. J., called attention to the many facts which remained obscure concerning the signing of the contracts, the authorization of their specific terms, the request to enter an appearance given the solicitors, and the authority of the defendants generally, including their rights to trade and the purposes for which they were formed. In the course of his opinion and after discussing *Krajina v. Tass Agency*, [1949] 2 All E.R. 274, and other cases, he declared (p. 963):

I know of no case which goes as far as does the claim made by the defendants here. I cannot find that it has been almost universally recognized, that if a government sets up a legal entity, something which may contract on its own behalf as a limited company does in this country, it can succeed in a claim for sovereign immunity in respect of the activities of that company or entity. The claim goes further than has been generally recognized, and, in the interests of good government, and in the interests of business relationship and business dealings throughout the world, I do not think that the claim ought to be allowed on the material before us. . . .

On the waiver point, he declared (p. 965):

. . . Prima facie, only certain people have authority to waive a right which is the right of the Government; but if the Government or the State goes outside the ordinary practice and founds a separate company or juridical or juristic person to do its business, one would expect it to leave the carrying on of the business to the body or entity which it has set up. The business would include the making and perhaps the breaking of contracts.

Speaking for the majority, Jenkins, L. J., declared (pp. 967, 968):

In my view of the evidence, it is reasonably plain that while the defendants undoubtedly were constituted a juristic personality with powers resembling those of a natural person, they were only accorded that status for the purposes for which they were formed; and the purposes for which they were formed, were, briefly, the importing and exporting of grain for the Spanish Government in accordance with the directions of the Spanish Ministry of Agriculture and the policy from time to time laid down by the Spanish Government. Thus it seems to me that although their status was a corporate status, their functions were wholly those of a department of State. . . . once it is found on the evidence that the party sued is in truth a department of a

Sovereign State, albeit itself a corporate body, then the suit becomes or it becomes apparent that the suit in truth is one, between the plaintiff and the foreign Sovereign State or the part of the foreign Sovereign State represented by the departmental body concerned.

The court was careful to distinguish the instant case from one in which the interest of the state, evidenced by merely holding shares, was in issue. The critical point in the instant case was thought to be the connection between the operations of the defendant and the responsibility assumed by the state. The same rationale is evident in the opinion of Parker, L. J., the latter stating (p. 973):

... It is not a company limited by shares in which the State holds the whole or a controlling interest, and it is not a body which for that or some other reason is wholly distinct from the State. If that were so—and it seems to me that was the position in the American case to which my Lord has referred—then to grant sovereign immunity to such a body would be a real extension of the principle.¹

Leave to appeal to the House of Lords was granted. *Baccons S. R. L. v. Servicio Nacional del Trigo*, [1956] 3 W.L.R. 948 (Great Britain, Ct. App., Oct. 31, 1956, Singleton, Parker and Jenkins, L. JJ.).

Conspiracy in England to defraud persons in Germany

In *Regina v. Owen*, [1956] 3 W.L.R. 739 (Great Britain, Ct. Crim. App., Oct. 2, 1956, Goddard, C. J.), appellants were convicted on two counts of conspiracy in a six-count indictment. The third count charged them with conspiring to defraud the export control department of the Federal Republic of West Germany by causing export licenses for metals to be issued to them on the basis of fraudulent representations that the metals were to be transported to Ireland when in fact they knew that their intended destinations were Czechoslovakia, Poland, Rumania, and the U.S.S.R., to which export was prohibited. The fifth count charged them with uttering forged documents purported to be end-user certificates of the Department of Industry and Commerce of the Republic of Ireland certifying intended importation into Ireland.

The court held that conspiring to commit a crime abroad was not indictable in England unless the contemplated crime was itself one for which an indictment would lie in England. It stated the rule, qualified by certain exceptions, as follows:

[t]he true rule is that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here. (p. 745.)

As to the second count (No. 5) the court found that it could be supported in fact since the act of utterance is completed not upon the receipt

¹ The case referred to by the Lord Justices is *Ulen & Co. v. Bank Gospodarstwa Krajowego* (National Economic Bank), 24 N.Y.S. 2d. 201 (1940), inaccurately but pardonably identified on p. 963 as "a decision of the Court of Appeal of the state of New York."—Ed.

of the forged instrument but rather upon its mailing. Therefore the forgery and the conspiracy to defraud could have been totally committed in England, making the defendants liable for these acts in an English court of law.

Conflict of laws—determination of validity of marriages of members of Polish forces stationed in Italy

In *Holdowanski v. Holdowanski*, [1956] 3 W.L.R. 935 (Great Britain, Probate Division, Oct. 8, 1956, Karminski, J.), action was brought to nullify two marriages in Italy of Polish nationals now living in Great Britain. Ceremonies were performed by Polish Army chaplains in 1946 according to the rites of the Roman Catholic Church to which the parties belonged. Husbands were members of the Polish armed forces of occupation. The couples have since cohabited and intent for lawful marriage was clear. The court annulled the marriages, finding them invalid under Italian law and Polish law. The Polish Resettlement Act of 1947 was held inapplicable. The court also rejected a contention that members of a belligerent force in occupying status were not to be controlled by the *lex loci*, on the ground their personal law would then apply and the marriages were still invalid under Polish law. The Polish law applicable was that of the Lublin government, which the United Kingdom had recognized in July, 1945, and, according to that law, Polish forces abroad were not considered to be units of the Polish Army after February 14, 1946.

Jurisdiction—use of trademark in foreign country

In *Vanity Fair Mills, Inc. v. The T. Eaton Co., Limited*, 234 F.2d. 633 (2nd Cir.), digested in 51 A.J.I.L. 103 (1957), certiorari was denied Oct. 15, 1956, 352 U. S. 871; rehearing was denied Nov. 13, 1956, *ibid.* 913. See editorial comment above, p. 380.

Jurisdiction—habeas corpus—Japanese authority over U. S. servicemen's crimes

In *Cozart v. Wilson*, 236 F.2d 732 (Ct.A., Dist.Col., July 12, 1956, Edgerton, C. J.), a *habeas corpus* proceeding by servicemen stationed in Japan, one awaiting trial and the others having been convicted, it was held the court had jurisdiction but that the writ would be denied on the ground Japan had jurisdiction to try them for offenses committed in that country. On November 5, 1956, certiorari was granted, the judgment of the Court of Appeals was vacated, and the case remanded with instructions to dismiss on the ground the cause was moot. 352 U. S. 884 (Per Curiam).

Jurisdiction over crimes abroad—aliens

In *U. S. v. Flores-Rodriguez*, 237 F.2d 405, defendant alien was convicted for perjury in making false statement to U. S. Vice Consul in Havana. Jurisdiction was assumed without discussion other than that the Vice

Consul had authority to administer the oath. Compare, to the contrary, *U. S. v. Baker*, 136 F.Supp. 546 (U. S. Dist. Ct., S.D. N.Y., Dec. 22, 1955, Murphy, D. J.), digested in 50 A.J.I.L. 679 (1956).

Venue provisions applicable to suits under International Organizations Immunities Act

Plaintiff, a United Nations agency, brought suit against a New York corporation and two individuals, domiciliaries of Connecticut, claiming the International Organizations Immunities Act, 22 U.S.C.A. § 288 *et seq.*, opened the doors of United States courts, irrespective of Federal venue statutes. The court, Levet, D. J., held that the said Act did not confer greater privileges on United Nations organizations than on U. S. citizens and the U. S. Government itself, and that the venue provisions were therefore applicable. *United Nations Korean Reconstruction Agency v. Glass Production Methods, Inc., et al.*, 143 F.Supp. 248 (U. S. Dist. Ct., S.D. N.Y., Aug. 3, 1956).

Kingdom of Hawaii not a "foreign government" within statute prohibiting counterfeiting

In *U. S. v. 3,827 Coins*, 144 F.Supp. 740 (U. S. Dist. Ct., D. Hawaii, Oct. 3, 1956, Wiig, D. J.), coins created in resemblance to coins issued by the Kingdom of Hawaii in 1847 were held not to violate 18 U. S. C. A. § 489 because said Kingdom is not a "foreign government" within that section and the definition of "foreign government" in 18 U. S. C. A. § 811.

Atomic weapons tests—duty to warn—liability

In *Bulloch v. U. S.*, 145 F.Supp. 824 (U. S. Dist. Ct., Utah, Oct. 26, 1956, Christenson, D. J.), it was stated that the United States might be liable in atomic weapons tests for failure to warn, or use reasonable care, with respect to substantial danger and damage from radio-active fall-out.

Liability of United States for alleged Canadian dam construction damage

In *Huther v. U. S.*, 145 F.Supp. 916 (Ct. Claims, Nov. 7, 1956, Jones, C. J.), it was held the United States was not liable for alleged damage by Canadian dam construction to which the United States had consented and imposed conditions designed to protect U. S. citizens.

Service on consul in suit against foreign state

Oster v. Dominion of Canada, digested in 50 A.J.I.L. 962 (1956) from manuscript, has been printed in 144 F.Supp. 746. It held that service of process on the Canadian Consul in New York City did not confer jurisdiction in damage suit *in personam* against Canada.

Nationalization of Czechoslovakian bank—appointment of permanent receiver for New York assets

In *Stephen v. Zivnostenska Banka*, 155 N.Y.S. 2d 340 (Sup. Ct., Special Term, June 27, 1956, Capozzoli, J.), it was held that where 1950 Czech law provided the bank should cease to exist on a date determined by the Minister of Finance, to be published in the collection of laws, such a notice, although not in the collection of laws, was proof of nationalization and ceasing to do business which authorized appointment of receiver under N. Y. Civil Practice Act.

Service on managing agent of foreign banking corporation in foreign-based cause of action

In *Varga v. Credit Suisse*, 155 N.Y.S. 2d 655 (Sup. Ct., Special Term, Aug. 1, 1956, McGivern, J.), it was held that service on the managing agent in New York (when defendant was doing business in the state) was valid and an alternative to Sec. 200(3) of Banking Law which permits service on the Superintendent of Banks for action against a foreign bank arising out of a transaction with a New York agency. The transaction in the instant case arose out of foreign events.

AMERICAN CASES ON NATIONALITY AND ALIENS

Deportation. Fear of prosecution because of political views if forced to return to native countries: *Laudas v. Holland*, 235 F.2d 955 (3rd Cir., July 11, 1956); *U. S. ex rel. Paschalides v. District Director of Immigration*, 143 F.Supp. 310 (S.D.N.Y., July 19, 1956); *Mascarin v. Holland*, 143 F.Supp. 427 (E.D.Pa., July 17, 1956); *Bruno v. Sweet*, 235 F.2d 801 (8th Cir., July 17, 1956), conviction for narcotics; *Jimenez v. Barber*, 235 F.2d 922 (9th Cir., July 12, 1956), refusal to testify as to organizational affiliations; *Delmore v. Brownell*, 236 F.2d 598 (3rd Cir., Sept. 6, 1956), burden of proof as to prior determination of citizenship; *Banez v. Boyd*, 236 F.2d 934 (9th Cir., Sept. 26, 1956), status of alien under Philippine Independence Act; *Petition of Catalanatte*, 236 F.2d 955 (6th Cir., Aug. 27, 1956), effect of non-deportability status; *Suarez-Seja v. Landon*, 237 F.2d 133 (9th Cir., Sept. 18, 1956), procedure did not violate due process; *Ocon v. Guercia*, 237 F.2d 177 (9th Cir., Sept. 26, 1956), membership in Communist Party basis for deportation; *U. S. v. Flores-Rodriguez*, 237 F.2d 405 (2nd Cir., Oct. 1, 1956), "mentally defective" as used in the Immigration Act includes homosexuals; *U. S. v. Sanderson*, 237 F.2d 398 (9th Cir., Oct. 3, 1956), forfeiture of bond; *U. S. ex rel. Leon v. Shaughnessy*, 143 F.Supp. 270 (S.D.N.Y., July 19, 1956), relaxation of rules of procedure and evidence do not invalidate proceedings; *Application of Ellis*, 144 F.Supp. 448 (N.D.N.Y., Sept. 27, 1956); *Mannerfid v. Brownell*, 145 F.Supp. 55 (D.D.C., Jan. 30, 1956), effect of administrative *res judicata* and case law; *Tacettin Say v. Del Guercio*, 237 F.2d 715 (9th Cir., Oct. 16, 1956); *U. S. v. Zuskar*, 237 F.2d 528 (7th Cir., Oct. 24, 1956), subpoena

"person" as witness valid when no evidence such "person" is ultimate subject of proceeding; *Williams v. Butterfield*, 145 F.Supp. 567 (E.D. Mo., Oct. 17, 1956), admissibility of evidence; *Sentner v. Colarelli*, 145 F.Supp. 599 (E.D. Mo., Oct. 4, 1956), invalidity of order of supervision; *Craig v. Loya*, 237 F.2d 927 (9th Cir., Aug. 4, 1956), change in charge during proceeding.

Naturalization. Petition of Frank, 143 F.Supp. 82 (S.D.N.Y., July 6, 1956), expatriated person may be entitled to naturalization; question of country or residence; *Petition of Blanco*, 143 F.Supp. 85 (S.D.N.Y., July 6, 1956); *Petition of Holzer*, 143 F.Supp. 153 (S.D.N.Y., July 26, 1956); *Petition of Brzezinski*, 143 F.Supp. 597 (S.D.N.Y., July 12, 1956); *Wong Tom Wo v. Dulles*, 236 F.2d 622 (9th Cir., Aug. 27, 1956), residence in Hawaii; *Petition of Mirzoff*, 143 F.Supp. 177 (S.D.N.Y., June 27, 1956), claim of relief from military service; *In re Lujan Petition*, 144 F.Supp. 59 (D. Guam, Sept. 12, 1956); *Petition of Lee Wee*, 143 F.Supp. 736 (S.D. Calif., Aug. 15, 1956), good moral character; *U. S. v. Boufford*, 145 F.Supp. 732 (D.N.H., May 10, 1956); *In re Napalan's Petition*, 145 F.Supp. 735 (S.D.N.Y., Oct. 16, 1956), 1941 service on Philippine-owned ship not service on foreign vessel; *In re Iwanenko's Petition*, 145 F.Supp. 838 (N.D. Cal., Oct. 8, 1956), immaterial misrepresentation in visa application not bar.

Denaturalization. U. S. v. Montalbano, 236 F.2d 757 (3rd Cir., Aug. 21, 1956); *U. S. v. Costello*, 144 F.Supp. 779 (S.D.N.Y., Sept. 26, 1956), defendant must testify despite Fifth Amendment; *ibid.*, 145 F.Supp. 802 (S.D. N.Y., Oct. 23, 1956), illegal evidence.

Passport questions. Robeson v. Dulles, 235 F.2d 810 (Ct.A.D.C., June 1, 1956), exhaustion of administrative remedies; *Kraus v. Dulles*, 235 F.2d 811 (Ct.A.D.C., July 5, 1956), denial subject to judicial review; *Dayton v. Dulles*, 237 F.2d 43 (Ct.A.D.C., Sept. 13, 1956), use of confidential evidence; *Paquet v. U. S.*, 236 F.2d 203 (9th Cir., July 10, 1956), false statements, confession, coercion.

Expatriation. Bruni v. Dulles, 235 F.2d 855 (Ct.A.D.C., July 26, 1956), standard of proof; *Kenji Kamada v. Dulles*, 145 F.Supp. 457 (N.D. Cal., Aug. 10, 1956), involuntary action in Japan.

Adjudication of citizenship. Garcia v. Brownell, 236 F.2d 356 (9th Cir., Aug. 6, 1956); *Lee You Fee v. Dulles*, 236 F.2d 885 (7th Cir., Sept. 2, 1956); *U. S. ex rel. Lee Kum Hoy v. Shaughnessy*, 237 F.2d 307 (2nd Cir., Sept. 25, 1956), administration of blood tests; *Ma Chuck Moon v. Dulles*, 237 F.2d 241 (9th Cir., Oct. 1, 1956); *Dulles v. Tam Suey Jin*, 237 F.2d 500 (9th Cir., Oct. 1, 1956); *Yip Mie Jork v. Dulles*, 237 F.2d 383 (9th Cir., Oct. 19, 1956); *Lim Kwoch Soon v. Brownell*, 143 F.Supp. 388 (S.D.Tex., July 19, 1956); *Dulles v. Quan Yoke Fong*, 237 F.2d 496 (9th Cir., Oct. 1, 1956); *Lan Ah Yew v. Dulles*, 236 F.2d 415 (9th Cir., Aug. 20, 1956).

Alien status under Refugee Relief Act. Shio Han Sun v. Barber, 145 F.Supp. 850 (N.D.Calif., July 20, 1956); *Wong Hong Nee v. Barber*, 145 F.Supp. 947 (N.D.Calif., July 20, 1956); *Cheng Fu Sheng v. Barber*, 145 F.Supp. 913 (N.D.Calif., Sept. 28, 1956); *Mascarin v. Holland*, 143 F.Supp. 427 (E.D.Pa., July 17, 1956).

AMERICAN CASES ON ENEMY PROPERTY CONTROLS AND TRADING
WITH THE ENEMY ACT

Brownell v. Chase National Bank, 352 U. S. 36 (Nov. 19, 1956, Douglas, J.); *Taterka v. Brownell*, 143 F.Supp. 57 (D.C., S.D.N.Y., July 5, 1956); *Brownell v. Drews*, 143 F.Supp. 881 (D.C., E.D.Wis., Sept. 18, 1956); *Abrikossoff v. Brownell*, 145 F.Supp. 18 (D.C., Dist. of Col., Oct. 12, 1956); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A., etc. v. Brownell*, 145 F.Supp. 494 (D.C., Dist. Col., Oct. 10, 1956); *Rashap v. Brownell*, 145 F.Supp. 774 (E.D.N.Y., Nov. 14, 1956); *Compania Maritima v. U. S.*, 145 F.Supp. 935 (Ct.Claims, Nov. 7, 1956); *In re Schaurer's Estate*, 156 N.Y.S. 2d 611 (N.Y., Surrogate's Court, Dutchess County, Oct. 3, 1956); *In re Masayo Huga's Trust*, 155 N.Y.S. 2d 987; *In re Rihei Huga's Trust*, 155 N.Y.S. 2d 998; *In re Toshizo Huga's Trust*, 155 N.Y.S. 2d 1001; *In re Toshizo Huga's Trust*, 155 N.Y.S. 2d 1004; *In re Chiyo Tamura's Trust*, 155 N.Y.S. 2d 1007 (all N.Y. Sup. Ct., June 28, 1956, Markewich, J.); and *In re Masayo Huga's Trust*, 155 N.Y.S. 2d 1009 (*ibid.*, Oct. 9, 1956, Markewich, J.). [This group of related cases held, *inter alia*, that assets and income outside the United States were not vested by the Custodian's Order.]

Status of former Zone B as Italian territory

The Triestine paper *Il Piccolo* of December 12, 1956, reported a recent decision of the Court of Cassation at Rome holding that a second marriage in 1950 in former Zone B of the Free Territory of Trieste did not occur in foreign territory. The prosecution for bigamy was accordingly upheld. The basis of the court's decision was that Italian renunciation of sovereignty was on condition that an internationally autonomous and viable body be set up, and, the condition not having been met, Italian sovereignty continued *de jure* even though Zone B was *de facto* under Yugoslav military control.¹

DECISIONS IN THE OTHER AMERICAN REPUBLICS, SPAIN
AND PORTUGAL (1954-56) *

*Extradition—refusal on ground that claiming state had not shown
provision for punishment of juvenile offenders separate from adult
offenders*

The Government of Portugal requested the extradition by Brazil of Oliveira Lopes, eighteen years of age. Extradition was refused on two grounds, both derived from the Penal Code of Brazil:

(1) Under Article 23 of the Code, minors under eighteen years of age are "criminal irresponsibles," and the claim of Portugal has not clearly established that the accused was over eighteen when he committed the otherwise extraditable offenses.

¹ Material made available through courtesy of Howard E. Hensleigh of Washington, D. C.

* Prepared by Professor Covey T. Oliver of the Board of Editors.

2) Article 77 of the Brazilian Minors Code provides that offenders over fifteen but under twenty-one should be imprisoned completely and like adult prisoners. Since there is no clarification in the Portuguese claim for extradition as to whether there is a similar provision in Portuguese penal law, the requirement on Brazilian courts to comply rigorously with Article 77 necessitates the denial of the petition for extradition. *Denial of extradition claim of Portugal with respect to Jose Antonio de Oliveira Lima*. 111 *Arquivo Judiciario* (Rio de Janeiro) 131-132 (I, 1956) (Brazil: Supreme Federal Court, July, 1956).⁴²

Enemy assets—unconstitutionality of law providing for final vesting of properties formerly under custodial control

A law of December 29, 1951, provides for the vesting in the Mexican State of title to assets administered during the period of belligerency as enemy property. The Supreme Court of Mexico held the law unconstitutional under Articles 14 and 16 of the Constitution of 1917, because it fails to provide a hearing before the established tribunals with respect to the grounds upon which the expropriation action is taken. *Tuerkheim v. The Mexican State*, 119 *Semanario Judicial de la Federacion* (Mexico: Vin Epoca, 1195-96 (1955) (Mexico, Supreme Court, February, 1954).

NOTE: In *Adolfo Peters*, 121 *Semanario* 1450-1474 (1956), the Supreme Court maintained its previous position despite a determined attack by the Government, the arguments being extensively reported.

Practice of professions—invalidity of Mexican Law of Professions which discriminates against practice by foreigners and Mexicans by naturalization

With respect to Federal reserved power regarding the practice of liberal professions, the Law of Professions violates constitutional guaranties, since the law provides that Mexicans by nationality at birth may qualify for practice by registry of their professional credentials obtained abroad, while prohibiting similar registration in favor of aliens and naturalized Mexican citizens. The differentiation of the law is not based on the quality of the foreign studies but on nationality, an inadmissible basis of differentiation. (The report notes previous Supreme Court decisions to the same effect. *Alfonso Paredes Delgado v. The Mexican State* (1955), 121 *Semanario* 3571-78 (1956) (United Mexican States, Supreme Court, March, 1954).

Counterfeiting of foreign currency—uttering where receiver is aware of falsity

In *Lorenzo Payre and Another* (1955), *Jurisprudencia Argentina* (Buenos Aires) 195501, pp. 338-339 (Chamber of Criminal Appeals of the Federal Capital, March, 1955), the trial court had held that under Article 289 of the Criminal Code no offense was committed by the sale of counterfeit United States dollars to a person who knew they were false, because

⁴² No reference to treaty having been made, it is assumed that Portugal's request was based on comity rather than treaty.—ED.

defendants had not by this act put false foreign money into circulation. Also because of the purchaser's knowledge, the defendants were absolved of fraud.

The appellate court reversed and rendered on the grounds (1) that the Criminal Code provision directs itself to the act of counterfeiting or alteration; and (2) that by extension the principles applicable to national currency, which make criminal its introduction or transfer, as well as its falsification, ought to be applied to foreign currency.

Registration of international trademark—prior national registration of same surname—significance of definition of the meaning of word, "Surname" by the Royal Spanish Academy

The International Office of Industrial Property, Berne, in representation of Maison Prunier, S. A., domiciled at Cognac (France) applied for the registration of a trademark consisting of a picture of a chateau under a legend in small type "La Vieille Maison," and in very large letters "Cognac Prunier." Cosme resisted the application on the ground of prior registration of the name "Prunier" in Spain, and the applicant responded that the Spanish registration of "Prunier" had as its objective the appropriation of the good will of the applicant and that the prior registrant had no right to the name, since it was neither a fanciful word nor a surname which Cosme could legally use.

The lower court granted the application, and Cosme appealed. The Supreme Tribunal reversed, reinstating the prior Spanish registration, on the grounds: (1) that the governing legislation is based on priority of registration in Spain, which took place in 1933, whereas the applicant made no claim for protection until 1948; (2) that as for the contention of the applicant with respect to the surname, none of the various definitions of "surname" recognized by the Royal Academy of the Spanish Language allude to the designation of a mercantile company, it being understood even in common usage that the word "surname" applies only to individuals, families, or family lineage. *P. Cosme v. Spanish Registry of Industrial Property* (1956), Aranzadi, Repertorio de Jurisprudencia (Pamplona), Año XXIII, No. 4, pp. 882-883 (Supreme Tribunal of Spain in Contentious-Administrative Jurisdiction, Feb. 13, 1956).

PEACE TREATY INTERPRETATION—STATUS OF "ITALIAN SOCIAL REPUBLIC"

UNITED STATES OF AMERICA EX REL. TREVES *v.* ITALIAN REPUBLIC.¹

Case 95. U. S.—Italy Conciliation Commission,² Sept. 24, 1956.

Elia Treves, an Italian national of Jewish race, was arrested in Turin by Italian Fascists, imprisoned, and after December 2, 1943, transferred to

¹ Unpublished; digested by Wm. W. Bishop, Jr., of the Board of Editors, from mimeographed copy made available by an officer of the Department of State.

² Under Art. 83 of the Italian Peace Treaty, and consisting of A. J. Maturri as U. S. Representative, Antonio Sorrentino as Italian Representative, and Judge Plinio Bolla of Switzerland as "third member." See 50 A.J.I.L. 150 (1956) for digests of other cases decided by this Commission.

extermination camps in Germany. Two of his three sons, present alive in 1945, were Italians who became naturalized American citizens on July 19, 1945 and May 13, 1946, respectively. The Italian tax collector demanded of the sons payment of the special progressive tax on the real property and stocks in Italy which had belonged to their father Elia at the time of his death and which they inherited. They sought exemption from this tax which it was agreed fell within the provisions of Article 78, paragraph 6 of the Italian Peace Treaty, exempting United Nations nationals from such tax.³ The Italian Government contended that as they had not become American citizens until after September 3, 1943, the date of the Italian Armistice, they were not "United Nations nationals" within Article 78, paragraph 9(a) of the treaty.

The Conciliation Commission upheld the claims of the two sons on the ground that they came within the second subparagraph of the definition paragraph referred to, which read:

The term "United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy.

Even though neither the father nor sons had been ill-treated by Italian authorities prior to the armistice date, the Commission rejected the Italian contention that this date must be read into the second subparagraph. In contrast with the date of United Nations nationality required under the first subparagraph, "the drafters of the Treaty of Peace had no reason to guard against fraudulent manoeuvres, subsequent to the Armistice and directed at obtaining a more favorable treatment in the application of the Treaty of Peace to come, by the insertion of a time-limit," in the case of those who were "treated as enemy." Indeed, the second subparagraph gave its own time limit: "during the war." The Commission said that the drafters of the Peace Treaty must have been aware that the racial legislation in Italy "had become much more severe after the Armistice of the hands of the authorities of the Italian Social Republic." Thus the second subparagraph "would have largely failed one of its recognizable purposes, which was that of lessening the harmful consequences of racial persecution," if it took no account of such persecution after September 3, 1943.

To the Italian contention that the laws enacted by the Italian Social Republic did not constitute "laws in force in Italy," because "The Italian Social Republic was not a State, and even less the Italian State," the Commission answered:

For nineteen months, and therefore not transiently, there were thus, *de facto*, two Italys, each claiming to be the only lawful one. Each

³ Art. 78, par. 6, provides: "United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between September 3, 1943, and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded." T.I.A.S. No. 1648; 61 Stat. 1245; 42 A.J.I.L. Supp. 47,77 (1948).

had its own territorial base. At the outset the Italian Social Republic was more extended and had more population, but the territory controlled by it in the peninsula became gradually increasingly smaller. Also the Italian Social Republic, which cannot be considered as an agency of the German Reich, had its own Government, a local one but one which aimed at losing this quality and which exercised legal powers with effective extrinsicality, by means of appropriate agencies; these agencies carried out *de facto* a legislative, jurisdictional and executive activity; the laws enacted had the force of law for all citizens subjected to that system and were enforced as far as was permitted by the presence of foreign troops in the territory of the peninsula, by the civil war, by the deepening of the internal contrast in the Italian spirit which gave rise to the phenomenon of resistance. The Italian Social Republic specifically enacted laws, let alone the Jewish persecution, for the repression of the enemies of the new regime. . . .

For the purpose of Article 78, paragraph 9(a), second subparagraph, "Italy" was the entire Italian territory, including that controlled by the Italian Social Republic. Thus:

The only matter of importance in the minds of the drafters of the Treaty was therefore focussed on the laws which had actually been in force in that part of Italy where the treatment occurred and which had brought about that treatment; they did not and could not give any consideration to the legality of said laws *vis-a-vis* the Italian system as it existed prior to the Armistice and later in force in southern Italy. Likewise they could give no consideration to the fate that those laws would suffer in the legal system of post-war Italy.

The Commission concluded that the term "legislation" as used in the provision in question referred to the actual conditions in Italy during the war, though it distinguished measures authorized by some law from arbitrary action by individual officials.

The Italian agent claimed that the first racial legislation of the Italian Social Republic was the decree of January 4, 1944, after the ill-treatment of Elia Treves. But whether or not Elia's loss of freedom or life was the result of such "laws," the detention of his property after his death was such.

Although no provision of the Italian decrees specified that Italian nationals of Jewish race should be considered or treated as enemies, the Commission said:

the second paragraph of paragraph 9(a) of Article 78 does not require an abstract statement of similarity to enemy persons, and even less to persons having a specific enemy nationality; it is sufficient that the effective treatment ("traités," "treated") intended by the law and applied by the Italian authorities is that reserved to enemy persons.

In the present case one could consider Elia Treves' property as transferred to his sons on December 2, 1943, the presumed date of his death, and thus the sons were the ones "treated as enemy" by the confiscation in carrying out the decree of the Italian Social Republic of January 4, 1944; or else if the property were transferred to the claimants only following the actual decision of June 21, 1951, by which the Italian court declared the father

person dead, then Article 78, paragraph 6, exempted the property from the taxes referred to, and "the related privilege would therefore have simply followed the property of the late Elia."

The Italian representative dissented, particularly on the ground of references in the preamble of the Italian Peace Treaty to Italian co-operation with the Allies after the Armistice. In his opinion decrees of the Italian Social Republic could not be regarded as Italian legislation within the meaning of the treaty.

NOTE: Similar decisions were reached, over comparable dissenting opinions, in the companion cases of *United States ex rel. Levi v. Italian Republic*, Case 96, and *United States ex rel. Wollemborg v. Italian Republic*, Case 100, decided together with the principal case. In the *Levi* case real property had been confiscated after the decree of January 4, 1944, of the Italian Social Republic; but it had suffered damages during air bombardments in 1942 and again after confiscation in 1944. Since they were "United Nations nationals" because of the racial persecution, claimants were entitled as such to reimbursement of the special tax referred to in the principal case, and also to compensation for the wartime damage to the properties.

In the *Wollemborg* case, claimant took refuge in the United States in 1939 and served in the United States Army from May 20, 1943, to May 23, 1946, obtaining American citizenship on December 2, 1943. His land in Italy was not taken over by Italian authorities until December 16, 1943. Damage occurred in 1945. Even though he was not an American citizen at the time of the Armistice, September 3, 1943, he came within the treaty. Not passing upon the compensation-for-damage claims, the Commission held him entitled to refund of a sum paid by him in compromise settlement of the progressive tax from which Article 78, paragraph 6, exempted him. Whatever the status of the tax compromise in Italian law, it having been reached without claimant's Italian attorney being aware of his rights under the Peace Treaty, the Commission said:

one thing is certain: the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation.

BOOK REVIEWS AND NOTES

International Law Opinions. 3 Vols. Selected and Annotated by Lord McNair. Cambridge and New York: Cambridge University Press, 1956. Vol. I: *Peace.* pp. xxvi, 380; Vol. II: *Peace.* pp. viii, 415; Vol. III: *War and Neutrality.* pp. viii, 436. Index. \$35.00.

In 1938 Professor Arnold Duncan McNair published *The Law of Treaties—British Practice and Opinions*¹ with the purpose of setting forth the practice of the United Kingdom in that field of international law primarily as revealed by the hitherto unpublished legal advice given to the Crown by its Law Officers. The volumes under review extend this purpose and method to the whole field of international law and provide access to opinions expressed in British official quarters on practical questions of international law confronting the British Government "during the past three to four centuries, and more particularly between 1782 and the end of 1902."

There is "a vast field of international law," writes Lord McNair, "which municipal courts of law are never likely to touch; more and more we find international tribunals working in parts of this field, but the main source of law, apart from multipartite treaties, is to be found in the practice of governments." He does not suggest that the opinions given by legal advisers of foreign offices are "the law"; but they are a "material source" of international law "because in the majority of cases it is that advice which governs the practice of that State." The opinions given to the Crown by its Law Officers were not intended for publication and gained thereby an objectivity which makes them "resemble judgments, not the arguments of a pleader."

From many thousands of reports of successive generations of Law Officers, Lord McNair has made "a representative selection" which he presents *verbatim et literatim* in systematic form in thirty-one chapters. All the usual topics—*e.g.*, recognition, succession, high seas, denial of justice, violations of neutrality—are covered, with the exception of the law of treaties, upon which subject Lord McNair is bringing out an expanded second edition of his 1938 volume. As in that volume, the documentary texts are preceded or annotated by comments and opinions of Lord McNair. These observations are written with perceptiveness and grace and embody the ripe wisdom of a cultivated mind and an experienced international lawyer and judge.

One of the most fascinating opportunities afforded the close student of international law by these volumes is to be taken behind the scenes for contemporary appraisals of many well-known cases and controversies. New light is thrown on some; significant detail is added to others. Here, for example, are the opinions of the Law Officers on Mr. Gallatin's coachman;

¹ Reviewed in 33 A.J.I.L. 220 (1939).

the *Mattucoff Case*; *Mortensen v. Peters*; the *Araunah*; the *Huascar*; *British T. T. Co. v. M. S. S. Co.*; *Regina v. Anderson*; *Regina v. Lesley*; the *Creole*; the *Trent*; *Alabama*; the *Springbok*; the Lee-Paul-Ryder-Murray Report on the *Costa Rica Packet*; *Sun Yat Sen*; the *Charkieh*; *Walker v. Baird*—to name but only a few. Future writers on international law will disregard this treasurehouse at their peril.

Although some of the reports have only historical interest, the cumulative effect of the materials in *International Law Opinions* is to present a clear picture of British contributions to the development of public international law and at least a *prima facie* view of the British position on contemporary questions of international law. In this latter aspect, the volumes deliberately fall short of providing a treatise on "international law as interpreted and applied by Great Britain," comparable to what Charles Cheney Hyde did for American practice; or of providing an official *Digest of International Law* comparable to those of John Bassett Moore and Green H. Hackworth. Each of these publications taps source materials which are beyond the scope set by Lord McNair in limiting his documents largely to the Opinions of the Law Officers.

Valuable as are the *International Law Opinions*, there is still room for an official British *Digest of International Law*, and international lawyers will welcome the news that such a compilation is currently being prepared. Whether such a *Digest* could include the verbatim full-length reports of Lord McNair's volumes may be doubtful, and it seems likely that his volumes will remain unique.

Distinguished by the highest standards of editorial excellence, beautifully printed and fascinating to read, *International Law Opinions* is one of the most important collections of source materials on international law to appear during this century.

HERBERT W. BRIGGS

Diritto Internazionale. I. By Angelo Piero Sereni. Milan: Dott. A. Claffiè, 1956. pp. xxxi, 232. L. 1600.

Angelo Piero Sereni, an American practicing attorney-at-law in New York City and an Italian professor of international law, presents in the book under review the first part of his *Treatise on International Law*. This first part gives an historical introduction on the development of international law and its science and treats three fundamental problems: the international community, the sources of international law and the relation between international law and municipal legal orders.

Let us state at once that the volume is an excellent work. Methodologically it is, as this writer has long advocated, based on a combination of the Continental method of theoretical investigation and full use of the whole literature in all the principal languages with a full research into the practice of states and of relevant national and international court decisions. Theoretically, the author correctly stands on the basis that positive law is a normative phenomenon involving what should be rather than what is, that the presentation must maintain a sharp distinction between the statement of

the rules of international law actually in force and criticism of such law, or proposals *de lege ferenda*. He fully accepts Kelsen's theory of legal imputation, of the completeness of the international legal order, so that an international judge, like a national judge, is not allowed to arrive at a *non liquet* in a case before the court. He recognizes that international law, like all law, regulates in the last instance human conduct and cannot regulate anything else, although individuals are, under the present international law, not immediately but only mediately bound. It is therefore clear that the author, with one great exception, stands close to the "Vienna School" and often particularly close to formulations made by this reviewer.

The book invites a full and friendly discussion on all points of agreement and disagreement; but only a few remarks can be made within the framework of a book review. This reviewer, for instance, entirely shares the author's position and arguments against the denial of the legal character of international law; he is entirely in agreement with the author's pages on the nature of customary international law, and shares his stand against so-called "American International Law." This reviewer also agrees with the author's statement of the universality of the present-day international community, of which all states are *necessary* members, so that no state can withdraw from the international community; that international law came into being long before 1648 through the decentralization of the medieval *res publica christiana* of Europe; and that even since 1914 there has been no real break in the development of international law which even today is still basically the law of the society of sovereign states.

On the other hand, the reviewer has some reservations: It cannot be said, for example, that the Islamic world of the Middle Ages, or later, was part of the international community. We give greater importance to the year 1914; we affirm the existence not only of far-reaching transformations, but also of a crisis of international law at the present time. Theoretically we cannot accept the author's dictum that rules of international comity or of international morality are "not obligatory"; they are merely not *legally* obligatory, for the rules of law constitute only one type of norms.

There is one fundamental position from which this reviewer must dissent emphatically: Even Sereni could not free himself from the dualistic conception which has held the whole Italian School of international law without any exception under its domination and constitutes today its chief weakness. Even Italian international lawyers have recognized the untenability of dualism and have tried to reform it while still retaining it. But Balladore Pallieri's essay in this direction was not successful, and a recent radical attempt at reformation by Arangio-Ruiz led to absurd results. The "realism" of the practice of states is invoked; it is paradoxical to see that the dualists rely for justification on dicta of international courts, dicta which most clearly refute this doctrine. The latter has often in fact a strong feeling of nationalism as its real basis; but Sereni correctly recognizes that the states are *subordinated* to international law. It is further incorrect to state that the primacy of international law, as defended by the "Vienna School," means that a municipal law which is contrary to inter-

national law is automatically invalid. On the contrary, the "Vienna School" admits that such conflicts are perfectly possible, but that they are only provisional, since a procedure provided by international law allows solution of the conflict; and this conflict, as the practice of international courts shows, has always been solved in favor of international law, as the supra-ordinated law. Fully to refute the thesis of dualism would, of course, demand a study: here we refer only to the brilliant pages recently written by Verdross (*Völkerrecht* (1953), pp. 61-72).

This dualistic theory radiates into many other parts of the book and leads the author to positions which cannot be accepted; that is the real reason why he rejects the thesis of the primitiveness of international law; why, according to the author, an individual under present-day international law can never be a bearer of international rights and duties. We note here that, in discussing the Nuremberg Trial, he argues that Germany by her unconditional surrender consented; that is untenable; Germany never surrendered unconditionally; the surrender, as the Allies insisted, was made only by the German High Command, a purely military act. His dualism explains why he arrives at the conclusion, for instance, that the internal law of the United Nations "is not international law." That is why he sees in the international treaty a very particular source, corresponding to statute plus contract in municipal law. But the municipal contract is equally a means for the production of rules; one must clearly distinguish between general abstract, and individual concrete norms. The treaty, like the contract, often produces only concrete norms; on the other hand, modern labor law knows municipal contracts which lay down general abstract rules.

JOSEF L. KUNZ

Theory and Reality in Public International Law. By Charles De Visscher. Translated by P. E. Corbett. Princeton: Princeton University Press, 1957. pp. xvi, 382. Index. \$5.00.

It is evident that the need for an English translation of this volume is an expression of the attention which the distinguished author's ideas have aroused among students of international law. Professor Corbett has, indeed, achieved an admirable endeavor of translation meriting the appreciation of the English-speaking students of international law.

In substance this work is a well-regulated inquiry into the relationship in international affairs between legal norms and power politics. Throughout the inquiry Professor De Visscher's endeavor is characterized by a synthesis of a remarkable comprehension of international politics and a profound knowledge of international law. The investigation explores four important aspects of the problem. The author embarks upon his study by tracing the origins, development, and present course of political power. In this direction he throws light upon the development of two rival conceptions of political power: first, the conception which perceives political power as a public service and regards it as the instrument of human purposes;

¹ Original French text (1953) reviewed in 49 A.J.I.L. 106 (1955).

and the other conception which upholds the absolutist idea of the state as self-sufficient and an end in itself.

The second part of the book is devoted to a consideration of the relations of power and law in international relations. Diplomacy is the means through which competition, which is the normal relationship between states, asserts itself. Thus conceived, political notions are steered in the direction of action and achievement, which necessitates the calculation of possibilities and the assessment of the power of rival states. The maxims of positive international law are the expression of a transitory equilibrium of these forces.

In the third and most extensive part Professor De Visser analyzes the points of tension between power and law in positive international law. He reveals the existence of the problem, discussing how the theories which propose the formal completeness of international law serve only to keep the issue out of sight.

In the fourth and last part of the book the author concerns himself with an examination of the judicial settlement of disputes. In this direction the author regards as significant the pointed insistence of the International Court of Justice in basing its jurisdiction upon the consent of the parties concerned. It appears to Professor De Visser that the Court is more concerned in establishing its jurisdiction upon a firm basis than in enlarging its jurisdiction.

This book is not easy for the beginner in international law to read, for it presupposes on the part of the reader a considerable knowledge of the subject. Nevertheless the work is of great value to the international lawyer and merits close study. The work presents a realistic approach in the field of public international law and thus sets up a new and valuable trend in this discipline.

ABDUL AZIZ SAID

Transnational Law. By Philip C. Jessup. New Haven: Yale University Press, 1956. pp. 113. \$3.00.

This is a delightful little volume which the scholar will read with the same pleasure and profit with which he read *A Modern Law of Nations*, published some years ago, in which Professor Jessup sought to show us the gaps in the traditional law and the new fields into which it was necessary to extend the law in the period of reconstruction following the war.

"Transnational Law" is a novel title. The author finds that "international" is inadequate to describe the problems of the "complex interrelated world community" which do in fact transcend national boundaries. Transnational law is thus taken "to include all law which regulates actions or events that transcend national boundaries"; and transnational situations may thus involve "individuals, corporations, states, organizations of states, or other groups."

Whether it is wise to abandon the traditional term "international law," actual and *de lege ferenda*, is a practical rather than a legal question. Clearly, we are dealing with relationships that call for regulation; and it

is a matter of lesser consequence whether the term "international law" is to be reserved for the field of relations in which states feel themselves obligated to act by reason of custom or treaty, and a new term "transnational law," created to describe the wide variety of economic, social, and moral pressures that actually do lead nations to act without the legal obligation to do so. It is a bit challenging, however, when Professor Jessup suggests by way of illustration that if the United States seeks to meet the needs of a particular country because we fear that the Soviet Union will do so and do not, the pressure that leads us to do so may have the same practical effect "as if there were an international legislature which made such suggestions legally obligatory."

So interesting and provocative is the first chapter, bearing as its title "The Universality of the Human Problems," that the reviewer wishes that the chapter could have been twice as long to make room for a dozen more "dramas," as they are called, illustrating the parallels between human problems at the different levels of human society. The two succeeding chapters are more technical, one discussing "The Power to Deal with the Problems," that is, the jurisdiction under which they fall, and the other "The Choice of Law Governing the Problems." Both chapters open up new vistas on the ways and means by which a solution of the problems of "transnational law" can be found if we look about us and recognize the range both of jurisdiction and of law actually being made effective here and now.

What the public at large needs, and perhaps scholars as well, is to have some of the mystery taken out of international law, and that is precisely what the present slender volume does for us. For it makes clear the multiplicity of human relationships that call for regulation and that are actually regulated not by formal treaties and conventions, such as constitute the substance of international law in the strict sense, but by informal arrangements at lower levels, if they may be so described—executive decisions, decisions of courts and of administrative tribunals, decisions of organizations of a specialized character, and the acts of other agencies of a formal and unofficial character. Much more exploration and analysis remains to be done, as Professor Jessup warns us, before we are ready for governmental action; and who is to chart the way in this task of exploration and analysis if it be not the scholar? The present volume has given him a good start.

C. G. FENWICK

Proposals for Changes in the United Nations. By Francis O. Wilcox and Carl M. Marcy. Washington: Brookings Institution, 1955. pp. 537. Index. \$5.00.

This is the second volume in the Brookings series on the United Nations. It will be of special interest because of its authors. When making the study Mr. Wilcox was Chief of Staff of the Foreign Relations Committee of the Senate and Mr. Marcy was Committee Consultant. Subsequently Mr. Wilcox has become Assistant Secretary of State for International Or-

ganization Affairs and Mr. Marcy has succeeded him as Chief of Staff to the Senate Committee. It may be assumed that these men have unusual insight into the potentials of United States policy on the subject about which they have written.

The book first reviews the various means available for Charter review and the history of the movement. It then proceeds with detailed discussion of various changes that have already taken place with respect to the basic purposes and processes of the United Nations as well as the alternate and additional proposals for change that have been made. The authors cover both official and unofficial proposals and weigh their likely impact on the United Nations system, the United States and other U.N. Members. In this way they cover proposals relating to (a) the bases of the U.N. system, including its general character, its scope, and qualifications for membership; (b) the maintenance of peace and security, including peaceful settlement of disputes, collective security action, an international police force, and the regulation of armaments; (c) the promotion of the general welfare, including economic, social and humanitarian affairs, non-self-governing territories and the trusteeship system; (d) general organizational structure and administration, including membership and voting in the Security Council and in the General Assembly, the jurisdiction of the International Court of Justice, the functions, organization and status of the Secretariat, and budgetary and financial problems.

The authors point out that many of the suggestions considered could be brought about without Charter amendment. Many changes have thus been made by interpretation and practice, others could be made by agreements not involving Charter revision. While admitting the dangers involved in the extremes of loose and strict construction, the statement is made that "there is considerable room for gradual growth and development" in an evolutionary process accepted by the great majority of Members. It is pointed out, however, that public attention, in the event of a conference, will be centered on Charter amendment proposals.

The point is made but not emphasized that the Charter can be amended at any time without recourse to a general conference. (The reviewer feels that this possibility is not adequately analyzed.) It seems apparent that the authors sympathize with the view of Secretary of State Dulles that "the advantages of a review conference exceed the possible disadvantages."

The concluding chapter of the volume, on the problem of achieving change, is worthy of particular scrutiny because of the official rôle played by the authors in the development of United States policy toward the United Nations. Here they give weight to changing world conditions that create serious questions as to both timing and method of achieving any desirable Charter changes upon which there might be agreement. Citing the extreme views regarding revision of the Charter either to strengthen or to weaken it, the authors state that few specific proposals can be said to have widespread support. They do not expect such support to develop, however, until proposals are made more specific, and point out that if changes are to be made, a time for such specification must come. To help bring this about, the authors proposed that the Tenth General Assembly take the "one

the opportunity (under Article 109 of the Charter) to agree to a new conference by a simple majority vote, with the ingenious proviso that the time and place of the conference should be considered by the Twelfth Assembly in 1957. This was the compromise voted by the 10th General Assembly. By foreshadowing this delay of a decision on a Charter conference the authors strengthen their point that the United States overlooked many of the significant developments in the U.N. system.

The weakness of the volume is its generality of conclusions. While the authors make the case for pushing toward greater specificity of proposals for Charter revision as necessary to any desirable changes, they do not greatly contribute to this end. Perhaps their main intent is to help develop opinion in favor of some form of "package deal" to strengthen the United Nations. It is indicated that such bargaining might favorably be made with respect to a universal agreement to come to the aid of victims of aggression by a two-thirds vote of the Assembly, three permanent members of the Security Council agreeing, with the signatories naming in advance the specific military components they would contribute to a police force. Trading possibilities are also projected with respect to weighted voting in the Assembly, particularly concerning financial contributions especially if the "voluntary programs" were to be absorbed into the regular U.N. budget with some formula for contribution ceilings being established. Considerable light is thrown throughout the book on these and other bargaining possibilities.

ANNE HARTWELL JOHNSTON

La Suisse et les Nations Unies. By Jacqueline Belin. (National Studies on International Organization prepared for the Carnegie Endowment for International Peace.) New York: Manhattan Publishing Co., 1956. pp. 140. Index. \$3.00.

Latin America in the United Nations. By John A. Houston. New York: Columbia University Press, 1956. pp. 346. Index. \$2.75.

Israel and the United Nations. Report of a Study Group of the Hebrew University of Jerusalem. (National Studies on International Organization prepared for the Carnegie Endowment for International Peace.) New York: Manhattan Publishing Co., 1956. pp. ii, 322. Index. \$3.00.

Denmark and the United Nations. By Max Sørensen and Niels J. Haagerup. (National Studies on International Organization prepared for the Carnegie Endowment for International Peace.) New York: Manhattan Publishing Co., 1956. pp. xiv, 151. Index. \$3.00.

Sweden and the United Nations. Swedish Institute of International Affairs. (National Studies on International Organization prepared for the Carnegie Endowment for International Peace.) New York: Manhattan Publishing Co., 1956. pp. x, 316. Index. \$3.00.

This series of studies is, or will be, obviously, of great value to students of international relations and international organization. The Carnegie

Endowment is to be warmly thanked for sponsoring and financing this enterprise.

It is too early to appraise the total result of this program. These first five items are excellent in quality and drafted and edited in excellent style. They vary considerably in significance, however. The volumes on Latin America, Denmark, and Sweden are unsensational, although useful and somewhat optimistic. The two volumes on Switzerland and Israel raise a number of more controversial questions. It must be said that they are treated with remarkable sanity and good sense, especially in the case of the volume on Switzerland.

It is also obvious that writing the volumes on the rôles played by the United States, the Soviet Union, Great Britain, France, and similar Powers (Japan, Italy, Brazil), will be a much more difficult job, and a more important job. It is not to be supposed that the easiest cases were selected first in designing this series, but the fact is that the most difficult cases remain to be treated. It still stands true that the crux of United Nations success or failure—as in the case of the League of Nations—depends upon the action or failure of action of the more important Member States.

PITMAN B. POTTER

The Council of Europe. By A. H. Robertson. Foreword by Guy Mollet. New York: Frederick A. Praeger, Inc., 1956. pp. xiii, 252. Index. \$7.75; 42 s.

The European Coal and Steel Community: Experiment in Supranationalism. By Henry L. Mason. The Hague: Martinus Nijhoff, 1955. pp. xii, 153. Index. Gld. 8.50.

These studies of two of the lesser-known international organizations illustrate, each in a very different way, the enormous practical difficulties in the way of effective integration of the political and economic policies of national states. Both books demonstrate that it is not the will toward international co-operation which is lacking nor the necessary knowledge and skills that are unavailable. Rather it appears that the staggering complexities of detail and the routine business of discovering the answers to the day-to-day questions concerning the operations of these organizations are the major barrier to increased international co-operation. In short we are shown that any advance in international organization is secured at the price of someone's assuming and dealing effectively with a veritable mountain of what is sometimes disparagingly referred to as "paper work." No amount of good will or good faith on the part of the states participating in such an effort can diminish this task. Ill will or bad faith on the part of the participants renders the task not only virtually impossible but well-nigh intolerable to those who must perform it.

Yet it is this "submerged portion of the iceberg," this unexciting, unpublicized, grinding labor, which renders the whole system of international organization so valuable to the nation-states that, at this stage, they probably could not abandon it if they would.

Studies like these have a value far beyond their usefulness as sources of information on the structure and achievements of the specific organizations with which they deal in that they bring to relative outsiders a realization of the existence and nature of this hidden value of international organization. Either, or preferably both, of these books are highly recommended as reading matter for those who criticize international organizations as "debating societies," or alternatively those who regard some kind of world government as a panacea for the world's ills.

The teacher or serious student of international organization will find either volume all he will ordinarily need to know about either organization. Mr. Robertson's study of the Council of Europe is also rewarding from the simpler standpoint of pleasurable reading. As seems often to be the happy lot of British scholars, he has proven again that the results of scholarship need not be concealed in excessively dull books.

LAWRENCE W. WADSWORTH

Annuaire Européen (European Yearbook). Vol. II. Published under the auspices of the Council of Europe. The Hague: Martinus Nijhoff, 1960. pp. xx, 727. Index. Gld. 35.00.

The joint editors of this series, Drs. Bart Landheer and A. H. Robertson, in two yearbooks have not been able to keep up with the movement for the integration of Europe. The first volume, in addition to broad general and special articles, included the documents of eight activities. This second volume, with special articles on particular activities and two on American and Soviet views on European integration, adds the documentation of seven more activities, with a continuation of the chronology and acts of the first eight. The editors intend to make their yearbook a record of European integration in a strict sense and therefore are giving precedence to those developments that are wholly Continental. For this reason they have not yet paid attention to the North Atlantic Treaty Organization, because of its extra-European impact, or to the European operations of the United Nations and the specialized agencies with European seats.

Articles in this volume, aside from that on American policy, by Van Michels Dean, and on Soviet views, by Max Beloff, are contributed by officials. A summary of the decisions of the Court of Justice of the European Coal and Steel Community is provided by Albert van Houtte, its Registrar. The Saar case is reviewed by the Council of Europe *rapporteur* M. van Naters, the Balkan Pacts by Djura Ninčić of Yugoslavia, the Nordic Council's record by Gustav Petrén of the Swedish delegation. Historical papers on the creation of Western European Union by A. H. Robertson and on the political problem of European defense in the Council of Europe by its Secretary General, Léon Marchal, are forward-looking. New sets of documents are supported and explained by three articles: on the European Payments Union of the Organization for European Economic Co-operation by Yves Biclet; on Benelux by its late Secretary General E.J.E.M.H. Jaspar; and on the International Statute on the Navigation of the Rhine by H. Walther, Secretary General of the Central Commission.

New documentation covers the International Commission on Civil Status, the Customs Co-operative Council, the European and Mediterranean Plant Protection Organization, and the Conference on the Co-ordination of Air Transport in Europe, in addition to the three also dealt with in articles. It is clear from the chronologies preceding the documents of the 15 activities so far dealt with in the yearbook that more institutions are developing and that some of them will at least approach the supranational.

DENYS P. MYERS

Die Pariser Verträge. Edited by Heinrich Brandweiner. Berlin: Akademie-Verlag, 1956. pp. xvi, 965. DM. 22.

In this massive, leather-bound volume, obviously published in East Berlin, the author edits the complete texts of the Paris Agreements of 1954 in German, English and French. So far, so good. But his "Introduction" (pp. 3-35) is nothing but a repetition of Soviet arguments and accusations, presented in German by a pro-Soviet Austrian writer.

JOSEF L. KUNZ

The Legal Status of Aircraft. By J. P. Honig. The Hague: Martinus Nijhoff, 1956. pp. viii, 214. Bibliography. Index. Gld. 12.50.

Problems of the legal status of aircraft in international law, and particularly that of jurisdiction over crimes committed on board aircraft, are currently attracting the attention of the Legal Committee of the International Civil Aviation Organization and of other bodies concerned with the development of international air law. The appearance of a good study of these problems by an independent investigator would, therefore, be particularly timely now.

Mr. Honig's book, however, is disappointing, perhaps because he has been too ambitious. He has produced a survey rather than a monograph. Instead of confining himself to the topics of nationality and jurisdiction, he has attempted, in effect, to cover the whole field of public international air law, and large chunks of private air law as well, including such matters as "the concept of air space," "freedom of the air," "development of the theory of sovereignty," "restrictions on air traffic," "rights in aircraft" (including security titles), and "civil jurisdiction." The results are superficial and sometimes misleading. It is neither helpful nor accurate, for example, to define the "fifth freedom" of the air as "the right of an airline to take on and discharge passengers at intermediate points along a through route traversing a number of countries" (page 23). It would have been easier and better to quote the actual language of the Chicago Air Transport Agreement. Nor is it correct to describe the "Bermuda" type of bilateral air transport agreements as "specifying the frequency of the flights and the capacity to be provided" (page 31). The attempted analysis of the position of the United States at the Chicago Conference can only confuse the reader. The implications drawn from the ownership and control clauses in the Chicago Air Services Transit Agreement and Air

Transport Agreement clearly contradict the language of the clauses quoted on the same page (page 50).

The important and difficult topic of "civil jurisdiction," including the problem of choice of law, is treated in less than forty pages. Needless to say, the result is inadequate. The topic is covered much better, in monographic fashion, by de Planta (see review in 51 A.J.I.L. 142 (1957)). In this and other chapters, the author assumes the desirability of uniformity, and never stops to question or justify this assumption. As is common among European writers, he completely ignores the existence of more than 48 jurisdictions with differing laws in the United States and the conclusions that might be drawn from this fact. In the chapter on criminal jurisdiction, the author dismisses the concept of concurrent jurisdiction without any serious examination of its merits or any attempt to inquire into its application to crimes committed on vessels in ports and the results of such application.

The sketchiness of the book and the many inaccuracies largely deprive it of value as a general survey of the field. It may be useful, however, as a guide to Dutch legislation, to which particular attention is paid.

OLIVER J. LISSITZIN

Air Charter and the Warsaw Convention: A Study in International Air Law. By Kurt Grönfors. The Hague: Martinus Nijhoff, 1956. pp. 143. Appendices. Gld. 9.50.

The framers of the Warsaw Convention of 1929 for the Unification of Certain Rules Relating to International Transportation by Air intentionally left open the question of the applicability of the convention to relations arising out of agreements for the charter of aircraft. Despite the increase in the number of such agreements in recent years, the question remained unanswered in the Protocol to Amend the Warsaw Convention, opened for signature at The Hague in September, 1955, and has not been passed on by the courts. Considerations of policy as well as logic must enter into any attempt to answer it. In the most exhaustive and convincing analysis of the problem yet published, Professor Grönfors has made a valuable contribution to the clarification of the issues involved. Particularly gratifying is his reliance on the purposes of the convention, rather than on formal interpretation or superficial analogies, as the criterion by which the applicability of the convention to a large variety of possible situations is to be determined. His discussion of the nature of the various types of air charters will be helpful not only to those concerned with the application of the Warsaw Convention, but also to those interested in other aspects of air law.

OLIVER J. LISSITZIN

Selected Readings on Conflict of Laws. Edited by Maurice S. Culp. St. Paul, Minn.: West Publishing Co., 1956. pp. xx, 1151. \$10.00.

This is a collection of American writings on conflict of laws compiled by committees of the Association of American Law Schools and edited by

Professor Maurice S. Culp, of Western Reserve University, assisted by an editorial subcommittee. On more than one thousand pages in the new double-space presentation, some eighty articles from the pens of forty-five authors, collected from sixteen different law reviews, two casebooks, and one collection of essays, have been assembled. These statistical data will suffice to show the magnitude of the undertaking which occupied successive committees for more than fifteen years. One piece included was written as early as 1910, but the bulk of the materials is of recent date.

Arranged in the order customary in textbooks on conflict of laws, the *Selected Readings* amounts to some kind of a textbook, although wide gaps in coverage remain, as is unavoidable for a book with materials not written for production of a cohesive work. To the materials reproduced, lists of "Additional Selected Readings" have been added at the end of each heading. They are valuable bibliographies, at the same time helping in filling the gaps.

The merits of this type of work depend upon the soundness of the selections made. No two specialists are likely to agree entirely on materials to be selected even for a single topic, yet the joint effort of the committees has brought about a selection which can only be praised when the difficulty of the task is duly considered. Many of the "classics" have gone into the volume and poor material has, on the whole, been kept out. What could not be included for lack of space can be found easily through the bibliographies.

This reviewer notes with disappointment that no specimen of the writing of our first author has been included. Space should have been found for an excerpt from Story's *Commentaries*, to open the part, "General Theories and Method." Here was the occasion to acquaint the student with the classic early American text. For correction in future editions, an omission in the bibliography for the part, "General Theories and Method," may also be noted. Not listed are the two book reviews by David F. Cavers in Volumes 56 and 63 of the *Harvard Law Review*, in which the author qualified the position taken in his article, "A Critique of the Choice of Law Problem," reprinted in the volume under review. Of course the question remains to what an extent the user will turn to the "Additional Selected Readings" listed. In this connection, the wisdom of attempting to cover "General Theories and Method" through a few articles may be debatable. While this reviewer finds no fault with the selections made, because of the risks involved in influencing in a difficult area where influence should be avoided, he would have favored omission of materials on "General Theories and Method" altogether. The volume would have been no less desirable with the omission.

With this general reservation, the contribution made to the study of conflict of laws through the *Selected Readings* cannot be overrated. The study of this difficult field requires more than the best casebook can furnish. Through the availability of this book with first-rate readings the efforts of teacher and student are greatly facilitated. The book will have an important rôle in instruction. While in the first place designed for law

school use, it will also be welcomed by the practitioner as an excellent collection and because of the useful bibliographies.

The volume will be of special value to the foreign conflicts specialist interested in American law but located at a place where American law reviews are not available. With its more than eighty articles the work represents a major library on American conflicts law. With these materials, a good casebook, the Restatement, and a good textbook, the foreign specialist can work quite satisfactorily in American conflicts law. This side effort in the production of the new volume which, it is hoped, the libraries abroad will duly notice, is particularly gratifying in a field where international co-operation and comparative law work are of vital importance.

The thanks of the profession go to the many who made themselves available for the accomplishment of this major undertaking, of which the sponsoring Association of American Law Schools can be proud.

KURT H. NADELMANN

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OFFICIAL DOCUMENTS

STATUS OF TANGIER

FINAL DECLARATION AND ANNEXED PROTOCOL OF THE INTERNATIONAL CONFERENCE OF TANGIER

*Done at Tangier, October 29, 1956; in force same date*¹

At the invitation of His Majesty the Sultan of Morocco, an international conference was held in Fedala and Tangier from October 8 to October 29, 1956, under the presidency of His Excellency the Minister of Foreign Affairs, representing His Majesty the Sultan, for the purpose of settling the questions raised by the abolition of the special régime of the Tangier Zone.

The Governments of:

Belgium

Spain

United States of America

France

Italy

Morocco

Netherlands

Portugal

United Kingdom of Great Britain and Northern Ireland, represented by their undersigned plenipotentiaries;

I

Desiring to establish the principles of the independence of Morocco and the unity and integrity of its territory,

Have agreed to recognize the abolition of the international régime of the Tangier Zone and hereby declare abrogated, insofar as they have participated therein, all acts, agreements, and conventions concerning the said régime;

Recognize, in consequence, that His Sherifian Majesty has been reinstated in all his powers and capacities in this part of the Sherifian Empire, which shall henceforth be under his entire and sole sovereignty, and that this gives him the unrestricted right to determine the future régime of Tangier.

II

Considering the deep concern affirmed by His Sherifian Majesty in respect of the private interests created under the former régime of Tangier

¹ Treaties and Other International Acts Series, No. 3680; 35 Department of State Bulletin 842 (Nov. 26, 1956).

and his earnest desire to ensure their security in the present and to promote their development in the future,

Being desirous of settling the questions arising out of the abolition of the international régime of Tangier according to the principles of justice and equity and in the spirit of understanding and friendship that has always prevailed in the relations of Morocco with the other Powers signatory to the present Declaration.

Have drawn up by mutual agreement the provisions contained in the Protocol attached hereto.

III

This Declaration and the said Protocol shall come into force on the date of their signature.

In witness whereof, the undersigned, authorized for this purpose by their respective Governments, have hereunto affixed their signatures

Done at Tangier, in nine copies, on October 29, 1956.

For Belgium: Stéphane Halot
S HALOT

For Spain: Cristobal del Castillo
CRISTOBAL DEL CASTILLO

For the United States of America: Cavendish W. Cannon
CAVENDISH W CANNON

For France: Baron Robert de Boisseson
R. DE BOISSESON

For Italy: Alberto Paveri Fontana
A. PAVERI FONTANA

For Morocco: Ahmed Balafrej
AHMED BALAFREJ

For the Netherlands: H. H. Dingemans
H. H. DINGEMANS

For Portugal: Manuel Homem de Mello
MANUEL HOMEM DE MELLO

For the United Kingdom of Great Britain and Northern Ireland:
Geoffrey Meade
GEOFFREY MEADE

ANNEXED PROTOCOL

With a view to settling the questions raised by the abrogation of the Special Statute of the Tangier Zone, the signatories of the Declaration of October 29, 1956 have unanimously adopted the provisions that form the subject of the present Protocol.

CHAPTER I

LEGISLATION AND DOMAIN

Article 1. The abolition of the special régime of Tangier terminates the general and permanent authority conferred on the International Administration by the Dahir of February 16, 1924. In consequence, the International Administration will cease to exercise the administrative powers that had been vested in it.

Article 2. The Moroccan State, which recovers possession of the public and private domain entrusted to the International Administration by virtue of the Dahir of February 16, 1924, receives the latter's property as constituted under Article 43 of the aforesaid Dahir. Subject to the provisions relating to the concessions, leases, and authorizations mentioned in Chapter IV, the Moroccan State will take over the debts and obligations duly contracted by the International Administration within the limits of the authority delegated to it by His Majesty the Sultan.

Article 3. The laws and regulations in force in the Tangier Zone on the date of signature of this Protocol shall continue in effect so long as they shall not have been amended or abrogated.

Article 4. The situation of persons practicing a liberal profession in Tangier on the date of signature of this Protocol shall be respected. Nevertheless, the Moroccan Government reserves the right to verify the regularity of the conditions under which they have been permitted to practice their professions and to make them subject to Moroccan legislation concerning the practice of their professional activities.

Article 5. In the event that the extension to Tangier of the legislation in force in Morocco should bring into question the operation of banking or financial companies or establishments, the Moroccan Government would take into consideration the situation of the persons concerned and would grant them a reasonable period within which to comply with the provisions of such legislation.

CHAPTER II

THE CIVIL SERVICE

Article 6. Within a maximum period of six months from the coming into force of the present Protocol, the Moroccan Government will notify each civil servant of the International Administration of its intention to keep him or not to keep him in its service and will inform those whom it wishes to keep of the employment conditions offered them.

Article 7. In the case of personnel whom the Moroccan Government does not wish to keep in its service, the aforesaid notice will mark the beginning of a period of thirty days at the expiration of which the said personnel will be definitely dropped from the roll and will cease to receive a salary.

Article 8. Personnel whom the Moroccan Government wishes to keep in its service must inform it, within a month of the notification of the offer made to them, whether they accept them. In case of refusal, they shall be discharged and definitely dropped from the roll.

Article 9. Personnel dropped from the roll pursuant to Articles 7 and 8 shall be entitled to:

(a) The allowance provided for by the Law of March 20, 1950 organizing the Welfare Fund of the International Administration;

(b) The agreed compensation for moving and installation expenses fixed in Article 34 of the Law of August 17, 1950 for personnel recruited outside the former Zone, provided they move to a place outside the same Zone within a maximum period of eighteen months from the termination of their duties;

(c) The salary for the days of leave to which they may be entitled at the time of their removal from the roll, in conformity with Article 46 of the Law of August 17, 1950;

(d) Severance pay calculated as follows:

(1) Personnel belonging to an administration of the country of which they are nationals shall receive compensation equal to six months' salary in base pay and allowances;

(2) Personnel not belonging to an administration of the country of which they are nationals shall receive:

Compensation equal to six months' salary in base pay and allowances when they are dropped from the roll after their refusal to accept the employment conditions offered them; or

Compensation equal to one year's salary in base pay and allowances when they are dropped from the roll without having been offered re-employment by the Moroccan Administration.

The foregoing provisions are applicable to the personnel provided by the Statute and to judicial personnel, as well as to the administrative personnel.

Article 10. If, at the expiration of the six months' period stipulated in Article 6, the Moroccan Government delays for more than three months the disclosure of its intentions with regard to a civil servant, the latter may at any time be removed from the roll at his request, and he shall then, according to the category to which he belongs, receive the compensation provided for in Article 9.

Article 11. Personnel whom the Moroccan Government keeps in its service may, at their request, obtain payment of the allowance due them from the Welfare Fund.

Article 12. Until the expiration of the period fixed in Article 7 for personnel who are not retained by the Moroccan Administration, or until the expiration of their employment contract in the case of personnel con-

tinued in service, the relations between the personnel concerned and the Moroccan Administration shall continue to be governed, as regards their respective rights and obligations, particularly in the matter of remuneration, discipline, and duties, by the texts that fixed the status of civil servants under the legislation of the Zone and subject to any changes that might be made because of the abolition of former organizations and disciplinary authorities.

CHAPTER III

CULTURAL, SCIENTIFIC, AND HOSPITAL INSTITUTIONS

Article 13. Cultural, scientific, and hospital institutions existing in Tangier on the date of signature of the present Protocol shall be maintained. However, the Moroccan Government reserves the right to make them subject to the laws that will govern the operation of such establishments, account being taken of the stipulations of the bilateral cultural conventions to be concluded. A reasonable period will be granted to the institutions concerned for the application of the said laws.

CHAPTER IV

CONCESSIONS, LEASES, AND AUTHORIZATIONS

Article 14. In the matter of concessions, leases, and authorizations, the abolition of the special régime of Tangier and its consequent incorporation into the Sherifian Empire involves, in this part of the territory, the application of Moroccan laws under the conditions mentioned in the articles of the present chapter.

Article 15. Concessions properly acquired and duly approved by Dahir of His Majesty the Sultan, before or after the promulgation of the Statute, shall be respected insofar as they conform to Article 45 of the Statute and on condition that they are subject to the laws in force in Morocco.

Article 16. His Majesty the Sultan will take under advisement, for the earliest possible settlement in accordance with the principle of justice and equity, concessions granted by the International Administration for a period beyond that of the Statute.

Article 17. His Majesty the Sultan will take under advisement, for the earliest possible settlement in accordance with the principle of justice and equity, additional arrangements obtained in good faith from the International Administration, when the said arrangements were not granted within the limits of the competence of the Administration or were not expressly approved by His Majesty the Sultan.

Article 18. Leases and authorizations obtained under the authority conferred on the International Administration by the Statute shall be respected.

Article 19. His Majesty the Sultan will take under advisement, for the earliest possible settlement in accordance with the principle of justice and

equity, leases and authorizations granted by the International Administration under conditions not in conformity with its authority under the Statute or with the provisions of the laws in force.

CHAPTER V

POST, TELEGRAPH, TELEPHONE, RADIOBROADCASTING, AND RADIOTELECOMMUNICATION

Article 20. The abolition of the special régime of the Tangier Zone involves the extension to that part of the territory of the Post, Telegraph and Telephone, the Radiobroadcasting, and the Radiotelecommunication monopoly belonging to the Moroccan State. In observance of this principle, of Moroccan public policy, and of the provisions of the legislation in force, the Post, Telegraph, and Telephone, the Radiobroadcasting, and the Radiotelecommunication establishments may continue to operate during a reasonable period to permit the Governments and companies concerned to:

- (a) Enter into special arrangements with the Moroccan Government concerning their establishments, for which account will be taken of the provisions of Chapter IV of this Protocol; or,
- (b) If necessary, to request sufficient time to enable them to take measures suited to their situation.

Done at Tangier, in nine copies, on October 29, 1956.

For Belgium: Stéphane Halot
S HALOT

For Spain: Cristobal del Castillo
CRISTOBAL DEL CASTILLO

For the United States of America: Cavendish W. Cannon
CAVENDISH W CANNON

For France: Baron Robert de Boisseson
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For Italy: Alberto Paveri Fontana
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For Portugal: Manuel Homem de Mello
MANUEL HOMEM DE MELLO

For the United Kingdom of Great Britain and Northern Ireland:
Geoffrey Meade
GEOFFREY MEADE

[NOTE: The adherence of Sweden to the Final Act and Protocol was deposited on Dec. 5, 1956.]

NOTE FROM THE UNITED STATES AMBASSADOR TO MOROCCO TO THE MINISTER
OF FOREIGN AFFAIRS OF MOROCCO CONCERNING RELINQUISHMENT OF
UNITED STATES CONSULAR JURISDICTION IN MOROCCO ¹

No. 63

RABAT, *October 6, 1956*

EXCELLENCY: I have the honor to refer to the statement issued by the Department of State on January 26, 1956,² announcing the intention of the United States Government to relinquish its consular jurisdiction in Morocco at the appropriate time in keeping with the desire to modernize this aspect of the treaty relationship between Morocco and the United States.

It is the decision of my Government to relinquish this day these consular jurisdictions which were accorded to the United States of America in a Treaty of Peace and Friendship first concluded with Morocco in 1787 and renewed in 1836 and in the Act of Algeciras signed in 1906; as well as to cease to exercise jurisdiction over subjects of Morocco or others who may be designated as proteges under the Convention of Madrid signed in 1880. It is my understanding, however, that American proteges will have access to the same local courts as American citizens in accordance with the procedures followed in the past when capitulations have been relinquished.

It affords me great satisfaction at the outset of my mission to convey to Your Excellency my Government's decision in this regard.

Accept, Excellency, the assurances of my highest consideration.

CAVENDISH W. CANNON

STATUTE OF THE INTERNATIONAL ATOMIC
ENERGY AGENCY

*Open for signature at United Nations Headquarters,
New York, October 26, 1956* ³

ARTICLE I

Establishment of the Agency

The Parties hereto establish an International Atomic Energy Agency (hereinafter referred to as "the Agency") upon the terms and conditions hereinafter set forth.

¹ 35 Department of State Bulletin 844 (1956).

² 34 *ibid.* 204 (1956).

³ Approved at the conclusion of the Conference on the Statute of the International Atomic Energy Agency held at United Nations Headquarters. Text in 35 Department of State Bulletin 820 (Nov. 19, 1956). Ratification of the Statute by the Government of the U.S.S.R. was announced Feb. 12, 1957, in a Supreme Soviet decree dated Feb. 9, 1957. No instruments of ratification have yet been deposited.

ARTICLE II

Objectives

The Agency shall seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. It shall ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose.

ARTICLE III

Functions

A. The Agency is authorized:

1. to encourage and assist research on, and development and practical application of, atomic energy for peaceful uses throughout the world, and, if requested to do so, to act as an intermediary for the purposes of securing the performance of services or the supplying of materials, equipment, or facilities by one member of the Agency for another; and to perform any operation or service useful in research on, or development or practical application of, atomic energy for peaceful purposes;

2. to make provision, in accordance with this Statute, for materials, services, equipment, and facilities to meet the needs of research on and development and practical application of, atomic energy for peaceful purposes, including the production of electric power, with due consideration for the needs of the under-developed areas of the world;

3. to foster the exchange of scientific and technical information on peaceful uses of atomic energy;

4. to encourage the exchange and training of scientists and experts in the field of peaceful uses of atomic energy;

5. to establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency or at its request or under its supervision or control are not used in such a way as to further any military purpose; and to apply safeguards, at the request of the parties, to any bilateral or multilateral arrangement, or, at the request of a state, to any of that state's activities in the field of atomic energy;

6. to establish or adopt, in consultation and, where appropriate, in collaboration with the competent organs of the United Nations and with the specialized agencies concerned, standards of safety for protection of health and minimization of danger to life and property (including such standards for labour conditions), and to provide for the application of these standards to its own operations as well as to the operations making use of materials, services, equipment, facilities, and information made available by the Agency or at its request or under its control or supervision; and to provide for the application of these standards, at the request of the

parties, to operations under any bilateral or multilateral arrangement, or, at the request of a state, to any of that state's activities in the field of atomic energy;

7. to acquire or establish any facilities, plant and equipment useful in carrying out its authorized functions, whenever the facilities, plant, and equipment otherwise available to it in the area concerned are inadequate or available only on terms it deems unsatisfactory.

B. In carrying out its functions, the Agency shall:

1. conduct its activities in accordance with the purposes and principles of the United Nations to promote peace and international co-operation, and in conformity with policies of the United Nations furthering the establishment of safeguarded worldwide disarmament and in conformity with any international agreements entered into pursuant to such policies;

2. establish control over the use of special fissionable materials received by the Agency, in order to ensure that these materials are used only for peaceful purposes;

3. allocate its resources in such a manner as to secure efficient utilization and the greatest possible general benefit in all areas of the world, bearing in mind the special needs of the under-developed areas of the world;

4. submit reports on its activities annually to the General Assembly of the United Nations and, when appropriate, to the Security Council: if in connexion with the activities of the Agency there should arise questions that are within the competence of the Security Council, the Agency shall notify the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security, and may also take the measures open to it under this Statute, including those provided in paragraph C of Article XII;

5. submit reports to the Economic and Social Council and other organs of the United Nations on matters within the competence of these organs.

C. In carrying out its functions, the Agency shall not make assistance to members subject to any political, economic, military, or other conditions incompatible with the provisions of this Statute.

D. Subject to the provisions of this Statute and to the terms of agreements concluded between a state or a group of states and the Agency which shall be in accordance with the provisions of the Statute, the activities of the Agency shall be carried out with due observance of the sovereign rights of states.

ARTICLE IV

Membership

A. The initial members of the Agency shall be those States Members of the United Nations or of any of the specialized agencies which shall have

signed this Statute within ninety days after it is opened for signature and shall have deposited an instrument of ratification.

B. Other members of the Agency shall be those states, whether or not Members of the United Nations or of any of the specialized agencies, which deposit an instrument of acceptance of this Statute after their membership has been approved by the General Conference upon the recommendation of the Board of Governors. In recommending and approving a state for membership, the Board of Governors and the General Conference shall determine that the state is able and willing to carry out the obligations of membership in the Agency, giving due consideration to its ability and willingness to act in accordance with the purposes and principles of the Charter of the United Nations.

C. The Agency is based on the principle of the sovereign equality of all its members, and all members, in order to ensure to all of them the right and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with this Statute.

ARTICLE V

General Conference

A. A General Conference consisting of representatives of all members shall meet in regular annual session and in such special sessions as shall be convened by the Director General at the request of the Board of Governors or of a majority of members. The sessions shall take place at the headquarters of the Agency unless otherwise determined by the General Conference.

B. At such sessions, each member shall be represented by one delegate who may be accompanied by alternates and by advisers. The cost of attendance of any delegation shall be borne by the member concerned.

C. The General Conference shall elect a President and such other officers as may be required at the beginning of each session. They shall hold office for the duration of the session. The General Conference, subject to the provisions of this Statute, shall adopt its own rules of procedure. Each member shall have one vote. Decisions pursuant to paragraph U of Article XIV, paragraph C of Article XVIII and paragraph B of Article XX shall be made by a two-thirds majority of the members present and voting. Decisions on other questions, including the determination of additional questions or categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting. A majority of members shall constitute a quorum.

D. The General Conference may discuss any questions or any matters within the scope of this Statute or relating to the powers and functions of any organs provided for in this Statute, and may make recommendations to the membership of the Agency or to the Board of Governors or to both on any such questions or matters.

E. The General Conference shall:

1. elect members of the Board of Governors in accordance with Article VI;
2. approve states for membership in accordance with Article IV;
3. suspend a member from the privileges and rights of membership in accordance with Article XIX;
4. consider the annual report of the Board;
5. in accordance with Article XIV, approve the budget of the Agency recommended by the Board or return it with recommendations as to its entirety or parts to the Board, for resubmission to the General Conference;
6. approve reports to be submitted to the United Nations as required by the relationship agreement between the Agency and the United Nations, except reports referred to in paragraph C of Article XII, or return them to the Board with its recommendations;
7. approve any agreement or agreements between the Agency and the United Nations and other organizations as provided in Article XVI or return such agreements with its recommendations to the Board, for resubmission to the General Conference;
8. approve rules and limitations regarding the exercise of borrowing powers by the Board, in accordance with paragraph G of Article XIV; approve rules regarding the acceptance of voluntary contributions to the Agency; and approve, in accordance with paragraph F of Article XIV, the manner in which the general fund referred to in that paragraph may be used;
9. approve amendments to this Statute in accordance with paragraph C of Article XVIII;
10. approve the appointment of the Director General in accordance with paragraph A of Article VII.

F. The General Conference shall have the authority:

1. to take decisions on any matters specifically referred to the General Conference for this purpose by the Board;
2. to propose matters for consideration by the Board and request from the Board reports on any matter relating to the functions of the Agency.

ARTICLE VI

Board of Governors

A. The Board of Governors shall be composed as follows:

1. The outgoing Board of Governors (or in the case of the first Board, the Preparatory Commission referred to in Annex I) shall designate for membership on the Board the five members most advanced in the technology of atomic energy including the production of source materials and the member most advanced in the technology of atomic energy including the production of source materials in each of the following areas not represented by the aforesaid five:

- (1) North America
- (2) Latin America
- (3) Western Europe
- (4) Eastern Europe
- (5) Africa and the Middle East
- (6) South Asia
- (7) South East Asia and the Pacific
- (8) Far East.

2. The outgoing Board of Governors (or in the case of the first Board the Preparatory Commission referred to in Annex I) shall designate for membership on the Board two members from among the following countries: producers of source materials: Belgium, Czechoslovakia, Poland, and Portugal; and shall also designate for membership on the Board one other member as a supplier of technical assistance. No member in this category in any one year will be eligible for redesignation in the same category for the following year.

3. The General Conference shall elect ten members to membership on the Board of Governors, with due regard to equitable representation on the Board as a whole of the members in the areas listed in sub-paragraph A-1 of this article, so that the Board shall at all times include in this category a representative of each of those areas except North America. Except for the five members chosen for a term of one year in accordance with paragraph D of this article, no member in this category in any one term of office will be eligible for re-election in the same category for the following term of office.

B. The designations provided for in sub-paragraphs A-1 and A-2 of this article shall take place not less than sixty days before each regular annual session of the General Conference. The elections provided for in sub-paragraph A-3 of this article shall take place at regular annual sessions of the General Conference.

C. Members represented on the Board of Governors in accordance with sub-paragraphs A-1 and A-2 of this article shall hold office from the end of the next regular annual session of the General Conference after their designation until the end of the following regular annual session of the General Conference.

D. Members represented on the Board of Governors in accordance with sub-paragraph A-3 of this article shall hold office from the end of the regular annual session of the General Conference at which they are elected until the end of the second regular annual session of the General Conference thereafter. In the election of these members for the first Board, however, five shall be chosen for a term of one year.

E. Each member of the Board of Governors shall have one vote. Decisions on the amount of the Agency's budget shall be made by a two-thirds majority of those present and voting, as provided in paragraph H of Article XIV. Decisions on other questions, including the determination of additional questions or categories of questions to be decided by a two-thirds

majority, shall be made by a majority of those present and voting. Two-thirds of all members of the Board shall constitute a quorum.

F. The Board of Governors shall have authority to carry out the functions of the Agency in accordance with this Statute, subject to its responsibilities to the General Conference as provided in this Statute.

G. The Board of Governors shall meet at such times as it may determine. The meetings shall take place at the headquarters of the Agency unless otherwise determined by the Board.

H. The Board of Governors shall elect a Chairman and other officers from among its members and, subject to the provisions of this Statute, shall adopt its own rules of procedure.

I. The Board of Governors may establish such committees as it deems advisable. The Board may appoint persons to represent it in its relations with other organizations.

J. The Board of Governors shall prepare an annual report to the General Conference concerning the affairs of the Agency and any projects approved by the Agency. The Board shall also prepare for submission to the General Conference such reports as the Agency is or may be required to make to the United Nations or to any other organization the work of which is related to that of the Agency. These reports, along with the annual reports, shall be submitted to members of the Agency at least one month before the regular annual session of the General Conference.

ARTICLE VII

Staff

A. The staff of the Agency shall be headed by a Director General. The Director General shall be appointed by the Board of Governors with the approval of the General Conference for a term of four years. He shall be the chief administrative officer of the Agency.

B. The Director General shall be responsible for the appointment, organization, and functioning of the staff and shall be under the authority of and subject to the control of the Board of Governors. He shall perform his duties in accordance with regulations adopted by the Board.

C. The staff shall include such qualified scientific and technical and other personnel as may be required to fulfil the objectives and functions of the Agency. The Agency shall be guided by the principle that its permanent staff shall be kept to a minimum.

D. The paramount consideration in the recruitment and employment of the staff and in the determination of the conditions of service shall be to secure employees of the highest standards of efficiency, technical competence, and integrity. Subject to this consideration, due regard shall be paid to the contributions of members to the Agency and to the importance of recruiting the staff on as wide a geographical basis as possible.

E. The terms and conditions on which the staff shall be appointed, remunerated, and dismissed shall be in accordance with regulations made by the Board of Governors, subject to the provisions of this Statute and to

general rules approved by the General Conference on the recommendation of the Board.

F. In the performance of their duties, the Director General and the staff shall not seek or receive instructions from any source external to the Agency. They shall refrain from any action which might reflect on their position as officials of the Agency; subject to their responsibilities to the Agency, they shall not disclose any industrial secret or other confidential information coming to their knowledge by reason of their official duties for the Agency. Each member undertakes to respect the international character of the responsibilities of the Director General and the staff and shall not seek to influence them in the discharge of their duties.

G. In this article the term "staff" includes guards.

ARTICLE VIII

Exchange of information

A. Each member should make available such information as would, in the judgment of the member, be helpful to the Agency.

B. Each member shall make available to the Agency all scientific information developed as a result of assistance extended by the Agency pursuant to Article XI.

C. The Agency shall assemble and make available in an accessible form the information made available to it under paragraphs A and B of this article. It shall take positive steps to encourage the exchange among its members of information relating to the nature and peaceful uses of atomic energy and shall serve as an intermediary among its members for this purpose.

ARTICLE IX

Supplying of materials

A. Members may make available to the Agency such quantities of special fissionable materials as they deem advisable and on such terms as shall be agreed with the Agency. The materials made available to the Agency may, at the discretion of the member making them available, be stored either by the member concerned or, with the agreement of the Agency, in the Agency's depots.

B. Members may also make available to the Agency source materials as defined in Article XX and other materials. The Board of Governors shall determine the quantities of such materials which the Agency will accept under agreements provided for in Article XIII.

C. Each member shall notify the Agency of the quantities, form, and composition of special fissionable materials, source materials, and other materials which that member is prepared, in conformity with its laws, to make available immediately or during a period specified by the Board of Governors.

D. On request of the Agency a member shall, from the materials which it has made available, without delay deliver to another member or group of

members such quantities of such materials as the Agency may specify, and shall without delay deliver to the Agency itself such quantities of such materials as are really necessary for operations and scientific research in the facilities of the Agency.

E. The quantities, form and composition of materials made available by any member may be changed at any time by the member with the approval of the Board of Governors.

F. An initial notification in accordance with paragraph C of this article shall be made within three months of the entry into force of this Statute with respect to the member concerned. In the absence of a contrary decision of the Board of Governors, the materials initially made available shall be for the period of the calendar year succeeding the year when this Statute takes effect with respect to the member concerned. Subsequent notifications shall likewise, in the absence of a contrary action by the Board, relate to the period of the calendar year following the notification and shall be made no later than the first day of November of each year.

G. The Agency shall specify the place and method of delivery and, where appropriate, the form and composition, of materials which it has requested a member to deliver from the amounts which that member has notified the Agency it is prepared to make available. The Agency shall also verify the quantities of materials delivered and shall report those quantities periodically to the members.

H. The Agency shall be responsible for storing and protecting materials in its possession. The Agency shall ensure that these materials shall be safeguarded against (1) hazards of the weather, (2) unauthorized removal or diversion, (3) damage or destruction, including sabotage, and (4) forcible seizure. In storing special fissionable materials in its possession, the Agency shall ensure the geographical distribution of these materials in such a way as not to allow concentration of large amounts of such materials in any one country or region of the world.

I. The Agency shall as soon as practicable establish or acquire such of the following as may be necessary:

1. plant equipment, and facilities for the receipt, storage, and issue of materials;
2. physical safeguards;
3. adequate health and safety measures;
4. control laboratories for the analysis and verification of materials received;
5. housing and administrative facilities for any staff required for the foregoing.

J. The materials made available pursuant to this article shall be used as determined by the Board of Governors in accordance with the provisions of this Statute. No member shall have the right to require that the materials it makes available to the Agency be kept separately by the Agency or to designate the specific project in which they must be used.

ARTICLE X

Services, equipment, and facilities

Members may make available to the Agency services, equipment, and facilities which may be of assistance in fulfilling the Agency's objectives and functions.

ARTICLE XI

Agency projects

A. Any member or group of members of the Agency desiring to set up any project for research on, or development or practical application of, atomic energy for peaceful purposes may request the assistance of the Agency in securing special fissionable and other materials, services, equipment, and facilities necessary for this purpose. Any such request shall be accompanied by an explanation of the purpose and extent of the project and shall be considered by the Board of Governors.

3. Upon request, the Agency may also assist any member or group of members to make arrangements to secure necessary financing from outside sources to carry out such projects. In extending this assistance, the Agency will not be required to provide any guarantees or to assume any financial responsibility for the project.

4. The Agency may arrange for the supplying of any materials, services, equipment, and facilities necessary for the project by one or more members or may itself undertake to provide any or all of these directly, taking into consideration the wishes of the member or members making the request.

5. For the purpose of considering the request, the Agency may send into the territory of the member or group of members making the request a person or persons qualified to examine the project. For this purpose the Agency may, with the approval of the member or group of members making the request, use members of its own staff or employ suitably qualified personnel of any member.

Before approving a project under this article, the Board of Governors shall give due consideration to:

1. the usefulness of the project, including its scientific and technical feasibility;

2. the adequacy of plans, funds, and technical personnel to assure an effective execution of the project;

3. the adequacy of proposed health and safety standards for handling and storing materials and for operating facilities;

4. the inability of the member or group of members making the request to secure the necessary finances, materials, facilities, equipment, and services;

5. the equitable distribution of materials and other resources available to the Agency;

6. the special needs of the under-developed areas of the world; and
7. such other matters as may be relevant.

F. Upon approving a project, the Agency shall enter into an agreement with the member or group of members submitting the project, which agreement shall:

1. provide for allocation to the project of any required special fissionable or other materials;

2. provide for transfer of special fissionable materials from their then place of custody, whether the materials be in the custody of the Agency or of the member making them available for use in Agency projects, to the member or group of members submitting the project, under conditions which ensure the safety of any shipment required and meet applicable health and safety standards;

3. set forth the terms and conditions, including charges, on which any materials, services, equipment, and facilities are to be provided by the Agency itself, and, if any such materials, services, equipment, and facilities are to be provided by a member, the terms and conditions as arranged for by the member or group of members submitting the project and the supplying member;

4. include undertakings by the member or group of members submitting the project (a) that the assistance provided shall not be used in such a way as to further any military purpose; and (b) that the project shall be subject to the safeguards provided for in Article XII, the relevant safeguards being specified in the agreement;

5. make appropriate provision regarding the rights and interests of the Agency and the member or members concerned in any inventions or discoveries, or any patents therein, arising from the project;

6. make appropriate provision regarding settlement of disputes;

7. include such other provisions as may be appropriate.

G. The provisions of this article shall also apply where appropriate to a request for materials, services, facilities, or equipment in connexion with an existing project.

ARTICLE XII

Agency safeguards

A. With respect to any Agency project, or other arrangement where the Agency is requested by the parties concerned to apply safeguards, the Agency shall have the following rights and responsibilities to the extent relevant to the project or arrangement:

1. to examine the design of specialized equipment and facilities, including nuclear reactors, and to approve it only from the viewpoint of assuring that it will not further any military purpose, that it complies with applicable health and safety standards, and that it will permit effective application of the safeguards provided for in this article;

2. to require the observance of any health and safety measures prescribed by the Agency;

3. to require the maintenance and production of operating records to assist in ensuring accountability for source and special fissionable materials used or produced in the project or arrangement;

4. to call for and receive progress reports;

5. to approve the means to be used for the chemical processing of irradiated materials solely to ensure that this chemical processing will not lend itself to diversion of materials for military purposes and will comply with applicable health and safety standards; to require that special fissionable materials recovered or produced as a by-product be used for peaceful purposes under continuing Agency safeguards for research or in reactors, existing or under construction, specified by the member or members concerned; and to require deposit with the Agency of any excess of any special fissionable materials recovered or produced as a by-product over what is needed for the above-stated uses in order to prevent stockpiling of these materials, provided that thereafter at the request of the member or members concerned special fissionable materials so deposited with the Agency shall be returned promptly to the member or members concerned for use under the same provisions as stated above;

6. to send into the territory of the recipient state or states inspectors, designated by the Agency after consultation with the state or states concerned, who shall have access at all times to all places and data and to any person who by reason of his occupation deals with materials, equipment, or facilities which are required by this Statute to be safeguarded, as necessary to account for source and special fissionable materials supplied and fissionable products and to determine whether there is compliance with the undertaking against use in furtherance of any military purpose referred to in sub-paragraph F-4 of Article XI, with the health and safety measures referred to in sub-paragraph A-2 of this article, and with any other conditions prescribed in the agreement between the Agency and the state or states concerned. Inspectors designated by the Agency shall be accompanied by representatives of the authorities of the state concerned, if that state so requests, provided that the inspectors shall not thereby be delayed or otherwise impeded in the exercise of their functions;

7. in the event of non-compliance and failure by the recipient state or states to take requested corrective steps within a reasonable time, to suspend or terminate assistance and withdraw any materials and equipment made available by the Agency or a member in furtherance of the project.

B. The Agency shall, as necessary, establish a staff of inspectors. The staff of inspectors shall have the responsibility of examining all operations conducted by the Agency itself to determine whether the Agency is complying with the health and safety measures prescribed by it for application to projects subject to its approval, supervision or control, and whether the Agency is taking adequate measures to prevent the source and special fissionable materials in its custody or used or produced in its own operations

from being used in furtherance of any military purpose. The Agency shall take remedial action forthwith to correct any non-compliance or failure to take adequate measures.

C. The staff of inspectors shall also have the responsibility of obtaining and verifying the accounting referred to in sub-paragraph A-6 of this article and of determining whether there is compliance with the undertaking referred to in sub-paragraph F-4 of Article XI, with the measures referred to in sub-paragraph A-2 of this article, and with all other conditions of the project prescribed in the agreement between the Agency and the state or states concerned. The inspectors shall report any non-compliance to the Director General who shall thereupon transmit the report to the Board of Governors. The Board shall call upon the recipient state or states to remedy forthwith any non-compliance which it finds to have occurred. The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations. In the event of failure of the recipient state or states to take fully corrective action within a reasonable time, the Board may take one or both of the following measures: direct curtailment or suspension of assistance being provided by the Agency or by a member, and call for the return of materials and equipment made available to the recipient member or group of members. The Agency may also, in accordance with Article XIX, suspend any non-complying member from the exercise of the privileges and rights of membership.

ARTICLE XIII

Reimbursement of members

Unless otherwise agreed upon between the Board of Governors and the member furnishing to the Agency materials, services, equipment, or facilities, the Board shall enter into an agreement with such member providing for reimbursement for the items furnished.

ARTICLE XIV

Finance

A. The Board of Governors shall submit to the General Conference the annual budget estimates for the expenses of the Agency. To facilitate the work of the Board in this regard, the Director General shall initially prepare the budget estimates. If the General Conference does not approve the estimates, it shall return them together with its recommendations to the Board. The Board shall then submit further estimates to the General Conference for its approval.

B. Expenditures of the Agency shall be classified under the following categories:

1. Administrative expenses: these shall include:

(a) costs of the staff of the Agency other than the staff employed in connexion with materials, services, equipment, and facilities referred to

in sub-paragraph B-2 below; costs of meetings; and expenditures required for the preparation of Agency projects and for the distribution of information;

(b) costs of implementing the safeguards referred to in Article XI in relation to Agency projects or, under sub-paragraph A-5 of Article XI in relation to any bilateral or multilateral arrangement, together with the costs of handling and storage of special fissionable material by the Agency other than the storage and handling charges referred to in paragraph E below;

2. Expenses, other than those included in sub-paragraph 1 of this paragraph, in connexion with any materials, facilities, plant, and equipment acquired or established by the Agency in carrying out its authorized functions, and the costs of materials, services, equipment, and facilities provided by it under agreements with one or more members.

C. In fixing the expenditures under sub-paragraph B-1 (b) above, the Board of Governors shall deduct such amounts as are recoverable under agreements regarding the application of safeguards between the Agency and parties to bilateral or multilateral arrangements.

D. The Board of Governors shall apportion the expenses referred to in sub-paragraph B-1 above, among members in accordance with a scale to be fixed by the General Conference. In fixing the scale the General Conference shall be guided by the principles adopted by the United Nations in assessing contributions of Member States to the regular budget of the United Nations.

E. The Board of Governors shall establish periodically a scale of charges, including reasonable uniform storage and handling charges, for materials, services, equipment, and facilities furnished to members by the Agency. The scale shall be designed to produce revenues for the Agency adequate to meet the expenses and costs referred to in sub-paragraph B-2 above, less any voluntary contributions which the Board of Governors may, in accordance with paragraph F, apply for this purpose. The proceeds of such charges shall be placed in a separate fund which shall be used to pay members for any materials, services, equipment, or facilities furnished by them and to meet other expenses referred to in sub-paragraph B-2 above which may be incurred by the Agency itself.

F. Any excess of revenues referred to in paragraph E over the expenses and costs there referred to, and any voluntary contributions to the Agency, shall be placed in a general fund which may be used as the Board of Governors, with the approval of the General Conference, may determine.

G. Subject to rules and limitations approved by the General Conference, the Board of Governors shall have the authority to exercise borrowing powers on behalf of the Agency without, however, imposing on members of the Agency any liability in respect of loans entered into pursuant to this authority, and to accept voluntary contributions made to the Agency.

II. Decisions of the General Conference on financial questions and of the Board of Governors on the amount of the Agency's budget shall require a two-thirds majority of those present and voting.

ARTICLE XV

Privileges and immunities

A. The Agency shall enjoy in the territory of each member such legal capacity and such privileges and immunities as are necessary for the exercise of its functions.

B. Delegates of members together with their alternates and advisers, Governors appointed to the Board together with their alternates and advisers, and the Director General and the staff of the Agency, shall enjoy such privileges and immunities as are necessary in the independent exercise of their functions in connexion with the Agency.

C. The legal capacity, privileges, and immunities referred to in this article shall be defined in a separate agreement or agreements between the Agency, represented for this purpose by the Director General acting under instructions of the Board of Governors, and the members.

ARTICLE XVI

Relationship with other organizations

A. The Board of Governors, with the approval of the General Conference, is authorized to enter into an agreement or agreements establishing an appropriate relationship between the Agency and the United Nations and any other organizations the work of which is related to that of the Agency.

B. The agreement or agreements establishing the relationship of the Agency and the United Nations shall provide for:

1. Submission by the Agency of reports as provided for in subparagraphs B-4 and B-6 of Article III;

2. Consideration by the Agency of resolutions relating to it adopted by the General Assembly or any of the Councils of the United Nations and the submission of reports, when requested, to the appropriate organ of the United Nations on the action taken by the Agency or by its members in accordance with this Statute as a result of such consideration.

ARTICLE XVII

Settlement of disputes

A. Any question or dispute concerning the interpretation or application of this Statute which is not settled by negotiation shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.

B. The General Conference and the Board of Governors are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the Agency's activities.

ARTICLE XVIII

Amendments and withdrawals

A. Amendments to this Statute may be proposed by any member. Certified copies of the text of any amendment proposed shall be prepared by the Director General and communicated by him to all members at least ninety days in advance of its consideration by the General Conference.

B. At the fifth annual session of the General Conference following the coming into force of this Statute, the question of a general review of the provisions of this Statute shall be placed on the agenda of that session. On approval by a majority of the members present and voting, the review will take place at the following General Conference. Thereafter, proposals on the question of a general review of this Statute may be submitted for decision by the General Conference under the same procedure.

C. Amendments shall come into force for all members when:

(i) approved by the General Conference by a two-thirds majority of those present and voting after consideration of observations submitted by the Board of Governors on each proposed amendment, and

(ii) accepted by two-thirds of all the members in accordance with their respective constitutional processes. Acceptance by a member shall be effected by the deposit of an instrument of acceptance with the depositary government referred to in paragraph C of Article XXI.

D. At any time after five years from the date when this Statute shall take effect in accordance with paragraph E of Article XXI or whenever a member is unwilling to accept an amendment to this Statute, it may withdraw from the Agency by notice in writing to that effect given to the depositary government referred to in paragraph C of Article XXI, which shall promptly inform the Board of Governors and all members.

E. Withdrawal by a member from the Agency shall not affect its contractual obligations entered into pursuant to Article XI or its budgetary obligations for the year in which it withdraws.

ARTICLE XIX

Suspension of privileges

A. A member of the Agency which is in arrears in the payment of its financial contributions to the Agency shall have no vote in the Agency if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two years. The General Conference may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member.

B. A member which has persistently violated the provisions of this Statute or of any agreement entered into by it pursuant to this Statute may be suspended from the exercise of the privileges and rights of membership by the General Conference acting by a two-thirds majority of the members present and voting upon recommendation by the Board of Governors.

ARTICLE XX

Definitions

As used in this Statute:

1. The term "special fissionable material" means plutonium-239; uranium-233; uranium enriched in the isotopes 235 or 233; any material containing one or more of the foregoing; and such other fissionable material as the Board of Governors shall from time to time determine; but the term "special fissionable material" does not include source material.

2. The term "uranium enriched in the isotopes 235 or 233" means uranium containing the isotopes 235 or 233 or both in an amount such that the abundance ratio of the sum of these isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature.

3. The term "source material" means uranium containing the mixture of isotopes occurring in nature; uranium depleted in the isotope 235; thorium; any of the foregoing in the form of metal, alloy, chemical compound, or concentrate; any other material containing one or more of the foregoing in such concentration as the Board of Governors shall from time to time determine; and such other material as the Board of Governors shall from time to time determine.

ARTICLE XXI

Signature, acceptance, and entry into force

A. This Statute shall be open for signature on 26 October 1956 by all States Members of the United Nations or of any of the specialized agencies and shall remain open for signature by those states for a period of ninety days.

B. The signatory states shall become parties to this Statute by deposit of an instrument of ratification.

C. Instruments of ratification by signatory states and instruments of acceptance by states whose membership has been approved under paragraph B of Article IV of this Statute shall be deposited with the Government of the United States of America, hereby designated as depositary government.

D. Ratification or acceptance of this Statute shall be effected by states in accordance with their respective constitutional processes.

E. This Statute, apart from the Annex, shall come into force when eighteen states have deposited instruments of ratification in accordance with paragraph B of this article, provided that such eighteen states shall include at least three of the following states: Canada, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Instruments of ratification and instruments of acceptance deposited thereafter shall take effect on the date of their receipt.

11. The depositary government shall promptly inform all states signatory to this Statute of the date of each deposit of ratification and the date of entry into force of the Statute. The depositary government shall promptly inform all signatories and members of the dates on which states subsequently become parties thereto.

12. The Annex to this Statute shall come into force on the first day the Statute is open for signature.

ARTICLE XXII

Registration with the United Nations

A. This Statute shall be registered by the depositary government pursuant to Article 102 of the Charter of the United Nations.

B. Agreements between the Agency and any member or members, agreements between the Agency and any other organization or organizations, and agreements between members subject to approval of the Agency, shall be registered with the Agency. Such agreements shall be registered by the Agency with the United Nations if registration is required under Article 102 of the Charter of the United Nations.

ARTICLE XXIII

Authentic texts and certified copies

This Statute, done in the Chinese, English, French, Russian and Spanish languages, each being equally authentic, shall be deposited in the archives of the depositary government. Duly certified copies of this Statute shall be transmitted by the depositary government to the governments of the other signatory states and to the governments of states admitted to membership under paragraph B of Article IV.

In witness whereof the undersigned, duly authorized, have signed this Statute.

DONE at the Headquarters of the United Nations, this twenty-sixth day of October, one thousand nine hundred and fifty-six.

Here follow signatures on behalf of Albania, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Canada, Ceylon, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Federal Republic of Germany, Greece, Guatemala, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Israel, Japan, Korea, Lebanon, Liberia, Libya, Monaco, The Netherlands, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Rumania, Spain, Sudan, Sweden, Switzerland, Syria, Thailand, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union

of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Vatican City, Venezuela, Viet-Nam, Yugoslavia.] ¹

ANNEX I

Preparatory Commission

A. A Preparatory Commission shall come into existence on the first day this Statute is open for signature. It shall be composed of one representative each of Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Portugal, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, and United States of America, and one representative each of six other states to be chosen by the International Conference on the Statute of the International Atomic Energy Agency. The Preparatory Commission shall remain in existence until this Statute comes into force and thereafter until the General Conference has convened and a Board of Governors has been selected in accordance with Article VI.

B. The expenses of the Preparatory Commission may be met by a loan provided by the United Nations and for this purpose the Preparatory Commission shall make the necessary arrangements with the appropriate authorities of the United Nations, including arrangements for repayment of the loan by the Agency. Should these funds be insufficient, the Preparatory Commission may accept advances from governments. Such advances may be set off against the contributions of the governments concerned to the Agency.

C. The Preparatory Commission shall:

1. elect its own officers, adopt its own rules of procedure, meet as often as necessary, determine its own place of meeting and establish such committees as it deems necessary;

2. appoint an executive secretary and staff as shall be necessary, who shall exercise such powers and perform such duties as the Commission may determine;

3. make arrangements for the first session of the General Conference, including the preparation of a provisional agenda and draft rules of procedure, such session to be held as soon as possible after the entry into force of this Statute;

4. make designations for membership on the first Board of Governors in accordance with sub-paragraphs A-1 and A-2 and paragraph B of Article VI;

5. make studies, reports, and recommendations for the first session of the General Conference and for the first meeting of the Board of Governors on subjects of concern to the Agency requiring immediate attention, including (a) the financing of the Agency; (b) the programmes and budget for

¹ The Statute was later signed on behalf of Afghanistan, Burma, Iraq, Italy, Laos, Luxembourg, Mexico, Morocco, Nicaragua, and Tunisia.

the first year of the Agency; (c) technical problems relevant to advance planning of Agency operations; (d) the establishment of a permanent Agency staff; and (e) the location of the permanent headquarters of the Agency;

6. make recommendations for the first meeting of the Board of Governors concerning the provisions of a headquarters agreement defining the status of the Agency and the rights and obligations which will exist in the relationship between the Agency and the host government;

7. (a) enter into negotiations with the United Nations with a view to the preparation of a draft agreement in accordance with Article XVI of this Statute, such draft agreement to be submitted to the first session of the General Conference and to the first meeting of the Board of Governors, and (b) make recommendations to the first session of the General Conference and to the first meeting of the Board of Governors concerning the relationship of the Agency to other international organizations as contemplated in Article XVI of this Statute.

RESOLUTION ADOPTED BY THE UNITED NATIONS GENERAL ASSEMBLY ON
JANUARY 11, 1957¹

The General Assembly,

Welcoming the unanimous adoption by representatives of eighty-one states, on 23 October 1956, of the Statute of the International Atomic Energy Agency,

Noting that paragraph 7 of section C of Annex I of the Statute authorizes the Preparatory Commission of the Agency to enter into negotiations with the United Nations with a view to the preparation of a draft agreement governing the relationship between the United Nations and the Agency in accordance with Article XVI of the Statute,

Desiring to initiate negotiations with the Agency with a view to bringing it into relationship with the United Nations, as provided for in Article XVI of the Statute,

1. *Authorizes* the Advisory Committee on the Peaceful Uses of Atomic Energy, as established on the basis of paragraph 5 of section B of General Assembly resolution 810 (IX) of 4 December 1954, to negotiate with the Preparatory Commission of the International Atomic Energy Agency a draft relationship agreement based on the principles set forth in the study prepared by the Secretary-General in consultation with the Advisory Committee, pursuant to paragraph 5 of part II of General Assembly resolution 912 (X) of 3 December 1955;

2. *Requests* the Advisory Committee to submit a report on the negotiations, together with the draft agreement resulting from these negotiations, to the General Assembly, at the twelfth session, for its approval.

¹ U.N. Doc. A/Rcs/450; 36 Department of State Bulletin 240 (1957).

² U.N. Doc. A/3122.

INTERNATIONAL FINANCE CORPORATION

ARTICLES OF AGREEMENT¹

Done at Washington, May 25, 1955; in force July 20, 1956 *

The Governments on whose behalf this Agreement is signed agree as follows:

INTRODUCTORY ARTICLE

The INTERNATIONAL FINANCE CORPORATION (hereinafter called the Corporation) is established and shall operate in accordance with the following provisions:

ARTICLE I

PURPOSE

The purpose of the Corporation is to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas, thus supplementing the activities of the International Bank for Reconstruction and Development (hereinafter called the Bank). In carrying out this purpose, the Corporation shall:

- (i) in association with private investors, assist in financing the establishment, improvement and expansion of productive private enterprises which would contribute to the development of its member countries by making investments, without guarantee of repayment by the member government concerned, in cases where sufficient private capital is not available on reasonable terms;
- (ii) seek to bring together investment opportunities, domestic and foreign private capital, and experienced management; and
- (iii) seek to stimulate, and to help create conditions conducive to, the flow of private capital, domestic and foreign, into productive investment in member countries.

The Corporation shall be guided in all its decisions by the provisions of this Article.

ARTICLE II

MEMBERSHIP AND CAPITAL

SECTION 1. *Membership*

(a) The original members of the Corporation shall be those members of the Bank listed in Schedule A hereto which shall, on or before the date

* Treaties and Other International Acts Series, No. 3620; 7 U. S. Treaties 2197. The following governments are parties by signature, and deposit of instruments of acceptance: Australia, Austria, Belgium, Bolivia, Brazil, Burma, Canada, Ceylon, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, German Federal Republic, Guatemala, Haiti, Honduras, Iceland, India, Indonesia, Iran, Iraq, Israel, Italy, Japan, Jordan, Lebanon, Luxembourg, Mexico, The Netherlands, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Sweden, Thailand, Turkey, United Kingdom, United States, Venezuela.

¹ The text printed herein, including signatures and Schedule A, is as certified by the Secretary of the International Bank for Reconstruction and Development on Dec. 7, 1955.

specified in Article IX, Section 2(c), accept membership in the Corporation.

(b) Membership shall be open to other members of the Bank at such times and in accordance with such terms as may be prescribed by the Corporation.

SECTION 2. *Capital Stock*

(a) The authorized capital stock of the Corporation shall be \$100,000,000 in terms of United States dollars.

(b) The authorized capital stock shall be divided into 100,000 shares having a par value of one thousand United States dollars each. Any such shares not initially subscribed by original members shall be available for subsequent subscription in accordance with Section 3(d) of this Article.

(c) The amount of capital stock at any time authorized may be increased by the Board of Governors as follows:

- i) by a majority of the votes cast, in case such increase is necessary for the purpose of issuing shares of capital stock on initial subscription by members other than original members, provided that the aggregate of any increases authorized pursuant to this subparagraph shall not exceed 10,000 shares;
- (ii) in any other case, by a three-fourths majority of the total voting power.

(d) In case of an increase authorized pursuant to paragraph (c)(ii) above, each member shall have a reasonable opportunity to subscribe, under such conditions as the Corporation shall decide, to a proportion of the increase of stock equivalent to the proportion which its stock theretofore subscribed bears to the total capital stock of the Corporation, but no member shall be obligated to subscribe to any part of the increased capital.

(e) Issuance of shares of stock, other than those subscribed either on initial subscription or pursuant to paragraph (d) above, shall require a three-fourths majority of the total voting power.

(f) Shares of stock of the Corporation shall be available for subscription only by, and shall be issued only to, members.

SECTION 3. *Subscriptions*

(a) Each original member shall subscribe to the number of shares of stock set forth opposite its name in Schedule A. The number of shares of stock to be subscribed by other members shall be determined by the Corporation.

(b) Shares of stock initially subscribed by original members shall be issued at par.

(c) The initial subscription of each original member shall be payable in full within 30 days after either the date on which the Corporation shall begin operations pursuant to Article IX, Section 3(b), or the date on which such original member becomes a member, whichever shall be later, or at

such date thereafter as the Corporation shall determine. Payment shall be made in gold or United States dollars in response to a call by the Corporation which shall specify the place or places of payment.

(d) The price and other terms of subscription of shares of stock to be subscribed, otherwise than on initial subscription by original members, shall be determined by the Corporation.

SECTION 4. *Limitation on Liability*

No member shall be liable, by reason of its membership, for obligations of the Corporation.

SECTION 5. *Restriction on Transfers and Pledges of Shares*

Shares of stock shall not be pledged or encumbered in any manner whatever, and shall be transferable only to the Corporation.

ARTICLE III

OPERATIONS

SECTION 1. *Financing Operations*

The Corporation may make investments of its funds in productive private enterprises in the territories of its members. The existence of a government or other public interest in such an enterprise shall not necessarily preclude the Corporation from making an investment therein.

SECTION 2. *Forms of Financing*

(a) The Corporation's financing shall not take the form of investments in capital stock. Subject to the foregoing, the Corporation may make investments of its funds in such form or forms as it may deem appropriate in the circumstances, including (but without limitation) investments according to the holder thereof the right to participate in earnings and the right to subscribe to, or to convert the investment into, capital stock.

(b) The Corporation shall not itself exercise any right to subscribe to, or to convert any investment into, capital stock.

SECTION 3. *Operational Principles*

The operations of the Corporation shall be conducted in accordance with the following principles:

- (i) the Corporation shall not undertake any financing for which in its opinion sufficient private capital could be obtained on reasonable terms;
- (ii) the Corporation shall not finance an enterprise in the territories of any member if the member objects to such financing;
- (iii) the Corporation shall impose no conditions that the proceeds of any financing by it shall be spent in the territories of any particular country;

- (iv) the Corporation shall not assume responsibility for managing any enterprise in which it has invested;
- (v) the Corporation shall undertake its financing on terms and conditions which it considers appropriate, taking into account the requirements of the enterprise, the risks being undertaken by the Corporation and the terms and conditions normally obtained by private investors for similar financing;
- (vi) the Corporation shall seek to revolve its funds by selling its investments to private investors whenever it can appropriately do so on satisfactory terms;
- (vii) the Corporation shall seek to maintain a reasonable diversification in its investments.

SECTION 4. *Protection of Interests*

Nothing in this Agreement shall prevent the Corporation, in the event of actual or threatened default on any of its investments, actual or threatened insolvency of the enterprise in which such investment shall have been made, or other situations which, in the opinion of the Corporation, threaten to jeopardize such investment, from taking such action and exercising such rights as it may deem necessary for the protection of its interests.

SECTION 5. *Applicability of Certain Foreign Exchange Restrictions*

Funds received by or payable to the Corporation in respect of an investment of the Corporation made in any member's territories pursuant to Section 1 of this Article shall not be free, solely by reason of any provision of this Agreement, from generally applicable foreign exchange restrictions, regulations and controls in force in the territories of that member.

SECTION 6. *Miscellaneous Operations*

In addition to the operations specified elsewhere in this Agreement the Corporation shall have the power to:

- (i) borrow funds, and in that connection to furnish such collateral or other security therefor as it shall determine; provided, however, that before making a public sale of its obligations in the markets of a member, the Corporation shall have obtained the approval of that member and of the member in whose currency the obligations are to be denominated;
- (ii) invest funds not needed in its financing operations in such obligations as it may determine and invest funds held by it for pension or similar purposes in any marketable securities, all without being subject to the restrictions imposed by other sections of this Article;
- (iii) guarantee securities in which it has invested in order to facilitate their sale;
- (iv) buy and sell securities it has issued or guaranteed or in which it has invested;

- (v) exercise such other powers incidental to its business as shall be necessary or desirable in furtherance of its purposes.

SECTION 7. *Valuation of Currencies*

Whenever it shall become necessary under this Agreement to value any currency in terms of the value of another currency, such valuation shall be as reasonably determined by the Corporation after consultation with the International Monetary Fund.

SECTION 8. *Warning To Be Placed on Securities*

Every security issued or guaranteed by the Corporation shall bear on its face a conspicuous statement to the effect that it is not an obligation of the Bank or, unless expressly stated on the security, of any government.

SECTION 9. *Political Activity Prohibited*

The Corporation and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in this Agreement.

ARTICLE IV

ORGANIZATION AND MANAGEMENT

SECTION 1. *Structure of the Corporation*

The Corporation shall have a Board of Governors, a Board of Directors, a Chairman of the Board of Directors, a President and such other officers and staff to perform such duties as the Corporation may determine.

SECTION 2. *Board of Governors*

(a) All the powers of the Corporation shall be vested in the Board of Governors.

(b) Each Governor and Alternate Governor of the Bank appointed by a member of the Bank which is also a member of the Corporation shall *ex officio* be a Governor or Alternate Governor, respectively, of the Corporation. No Alternate Governor may vote except in the absence of his principal. The Board of Governors shall select one of the Governors as Chairman of the Board of Governors. Any Governor or Alternate Governor shall cease to hold office if the member by which he was appointed shall cease to be a member of the Corporation.

(c) The Board of Governors may delegate to the Board of Directors authority to exercise any of its powers, except the power to:

- (i) admit new members and determine the conditions of their admission;
- (ii) increase or decrease the capital stock;

- (iii) suspend a member;
- (iv) decide appeals from interpretations of this Agreement given by the Board of Directors;
- (v) make arrangements to cooperate with other international organizations (other than informal arrangements of a temporary and administrative character);
- (vi) decide to suspend permanently the operations of the Corporation and to distribute its assets;
- (vii) declare dividends;
- (viii) amend this Agreement.

(d) The Board of Governors shall hold an annual meeting and such other meetings as may be provided for by the Board of Governors or called by the Board of Directors.

(e) The annual meeting of the Board of Governors shall be held in conjunction with the annual meeting of the Board of Governors of the Bank.

(f) A quorum for any meeting of the Board of Governors shall be a majority of the Governors, exercising not less than two-thirds of the total voting power.

(g) The Corporation may by regulation establish a procedure whereby the Board of Directors may obtain a vote of the Governors on a specific question without calling a meeting of the Board of Governors.

(h) The Board of Governors, and the Board of Directors to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Corporation.

(i) Governors and Alternate Governors shall serve as such without compensation from the Corporation.

SECTION 3. *Voting*

(a) Each member shall have two hundred fifty votes plus one additional vote for each share of stock held.

(b) Except as otherwise expressly provided, all matters before the Corporation shall be decided by a majority of the votes cast.

SECTION 4. *Board of Directors*

(a) The Board of Directors shall be responsible for the conduct of the general operations of the Corporation, and for this purpose shall exercise all the powers given to it by this Agreement or delegated to it by the Board of Governors.

(b) The Board of Directors of the Corporation shall be composed *ex officio* of each Executive Director of the Bank who shall have been either (i) appointed by a member of the Bank which is also a member of the Corporation, or (ii) elected in an election in which the votes of at least one member of the Bank which is also a member of the Corporation shall have counted toward his election. The Alternate to each such Executive Director of the Bank shall *ex officio* be an Alternate Director of the Corpora-

tion. Any Director shall cease to hold office if the member by which he was appointed, or if all the members whose votes counted toward his election, shall cease to be members of the Corporation.

(c) Each Director who is an appointed Executive Director of the Bank shall be entitled to cast the number of votes which the member by which he was so appointed is entitled to cast in the Corporation. Each Director who is an elected Executive Director of the Bank shall be entitled to cast the number of votes which the member or members of the Corporation whose votes counted toward his election in the Bank are entitled to cast in the Corporation. All the votes which a Director is entitled to cast shall be cast as a unit.

(d) An Alternate Director shall have full power to act in the absence of the Director who shall have appointed him. When a Director is present, his Alternate may participate in meetings but shall not vote.

(e) A quorum for any meeting of the Board of Directors shall be a majority of the Directors exercising not less than one-half of the total voting power.

(f) The Board of Directors shall meet as often as the business of the Corporation may require.

(g) The Board of Governors shall adopt regulations under which a member of the Corporation not entitled to appoint an Executive Director of the Bank may send a representative to attend any meeting of the Board of Directors of the Corporation when a request made by, or a matter particularly affecting, that member is under consideration.

SECTION 5. *Chairman, President and Staff*

(a) The President of the Bank shall be *ex officio* Chairman of the Board of Directors of the Corporation, but shall have no vote except a deciding vote in case of an equal division. He may participate in meetings of the Board of Governors but shall not vote at such meetings.

(b) The President of the Corporation shall be appointed by the Board of Directors on the recommendation of the Chairman. The President shall be chief of the operating staff of the Corporation. Under the direction of the Board of Directors and the general supervision of the Chairman, he shall conduct the ordinary business of the Corporation and under their general control shall be responsible for the organization, appointment and dismissal of the officers and staff. The President may participate in meetings of the Board of Directors but shall not vote at such meetings. The President shall cease to hold office by decision of the Board of Directors in which the Chairman concurs.

(c) The President, officers and staff of the Corporation, in the discharge of their offices, owe their duty entirely to the Corporation and to no other authority. Each member of the Corporation shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.

(d) Subject to the paramount importance of securing the highest standards of efficiency and of technical competence, due regard shall be paid, in

appointing the officers and staff of the Corporation, to the importance of recruiting personnel on as wide a geographical basis as possible.

SECTION 6. *Relationship to the Bank*

(a) The Corporation shall be an entity separate and distinct from the Bank and the funds of the Corporation shall be kept separate and apart from those of the Bank. The Corporation shall not lend to or borrow from the Bank. The provisions of this Section shall not prevent the Corporation from making arrangements with the Bank regarding facilities, personnel and services and arrangements for reimbursement of administrative expenses paid in the first instance by either organization on behalf of the other.

(b) Nothing in this Agreement shall make the Corporation liable for the acts or obligations of the Bank, or the Bank liable for the acts or obligations of the Corporation.

SECTION 7. *Relations With Other International Organizations*

The Corporation, acting through the Bank, shall enter into formal arrangements with the United Nations and may enter into such arrangements with other public international organizations having specialized responsibilities in related fields.

SECTION 8. *Location of Offices*

The principal office of the Corporation shall be in the same locality as the principal office of the Bank. The Corporation may establish other offices in the territories of any member.

SECTION 9. *Depositories*

Each member shall designate its central bank as a depository in which the Corporation may keep holdings of such member's currency or other assets of the Corporation or, if it has no central bank, it shall designate for such purpose such other institution as may be acceptable to the Corporation.

SECTION 10. *Channel of Communication*

Each member shall designate an appropriate authority with which the Corporation may communicate in connection with any matter arising under this Agreement.

SECTION 11. *Publication of Reports and Provision of Information*

(a) The Corporation shall publish an annual report containing an audited statement of its accounts and shall circulate to members at appropriate intervals a summary statement of its financial position and a profit and loss statement showing the results of its operations.

(b) The Corporation may publish such other reports as it deems desirable to carry out its purposes.

(c) Copies of all reports, statements and publications made under this Section shall be distributed to members.

SECTION 12. *Dividends*

(a) The Board of Governors may determine from time to time what part of the Corporation's net income and surplus, after making appropriate provision for reserves, shall be distributed as dividends.

(b) Dividends shall be distributed *pro rata* in proportion to capital stock held by members.

(c) Dividends shall be paid in such manner and in such currency or currencies as the Corporation shall determine.

ARTICLE V

WITHDRAWAL; SUSPENSION OF MEMBERSHIP; SUSPENSION OF OPERATIONS

SECTION 1. *Withdrawal by Members*

Any member may withdraw from membership in the Corporation at any time by transmitting a notice in writing to the Corporation at its principal office. Withdrawal shall become effective upon the date such notice is received.

SECTION 2. *Suspension of Membership*

(a) If a member fails to fulfill any of its obligations to the Corporation, the Corporation may suspend its membership by decision of a majority of the Governors, exercising a majority of the total voting power. The member so suspended shall automatically cease to be a member one year from the date of its suspension unless a decision is taken by the same majority to restore the member to good standing.

(b) While under suspension, a member shall not be entitled to exercise any rights under this Agreement except the right of withdrawal, but shall remain subject to all obligations.

SECTION 3. *Suspension or Cessation of Membership in the Bank*

Any member which is suspended from membership in, or ceases to be a member of, the Bank shall automatically be suspended from membership in, or cease to be a member of, the Corporation, as the case may be.

SECTION 4. *Rights and Duties of Governments Ceasing To Be Members*

(a) When a government ceases to be a member it shall remain liable for all amounts due from it to the Corporation. The Corporation shall arrange for the repurchase of such government's capital stock as a part of the settlement of accounts with it in accordance with the provisions of this Section, but the government shall have no other rights under this Agreement except as provided in this Section and in Article VIII (c).

(b) The Corporation and the government may agree on the repurchase of the capital stock of the government on such terms as may be appropriate under the circumstances, without regard to the provisions of paragraph (c) below. Such agreement may provide, among other things, for a final settlement of all obligations of the government to the Corporation.

(c) If such agreement shall not have been made within six months after the government ceases to be a member or such other time as the Corporation and such government may agree, the repurchase price of the government's capital stock shall be the value thereof shown by the books of the Corporation on the day when the government ceases to be a member. The repurchase of the capital stock shall be subject to the following conditions:

- (i) payments for shares of stock may be made from time to time, upon their surrender by the government, in such instalments, at such times and in such available currency or currencies as the Corporation reasonably determines, taking into account the financial position of the Corporation;
- (ii) any amount due to the government for its capital stock shall be withheld so long as the government or any of its agencies remains liable to the Corporation for payment of any amount and such amount may, at the option of the Corporation, be set off, as it becomes payable, against the amount due from the Corporation;
- (iii) if the Corporation sustains a net loss on the investments made pursuant to Article III, Section 1, and held by it on the date when the government ceases to be a member, and the amount of such loss exceeds the amount of the reserves provided therefor on such date, such government shall repay on demand the amount by which the repurchase price of its shares of stock would have been reduced if such loss had been taken into account when the repurchase price was determined.

(d) In no event shall any amount due to a government for its capital stock under this Section be paid until six months after the date upon which the government ceases to be a member. If within six months of the date upon which any government ceases to be a member the Corporation suspends operations under Section 5 of this Article, all rights of such government shall be determined by the provisions of such Section 5 and such government shall be considered still a member of the Corporation for purposes of such Section 5, except that it shall have no voting rights.

SECTION 5. *Suspension of Operations and Settlement of Obligations*

(a) The Corporation may permanently suspend its operations by vote of a majority of the Governors exercising a majority of the total voting power. After such suspension of operations the Corporation shall forthwith cease all activities, except those incident to the orderly realization, conservation and preservation of its assets and settlement of its obligations. Until final settlement of such obligations and distribution of such assets, the Corporation shall remain in existence and all mutual rights and obligations of the Corporation and its members under this Agreement shall continue unimpaired, except that no member shall be suspended or withdrawn and that no distribution shall be made to members except as in this Section provided.

(b) No distribution shall be made to members on account of their

subscriptions to the capital stock of the Corporation until all liabilities of creditors shall have been discharged or provided for and until the Board of Governors, by vote of a majority of the Governors exercising a majority of the total voting power, shall have decided to make such distribution.

(c) Subject to the foregoing, the Corporation shall distribute the assets of the Corporation to members *pro rata* in proportion to capital stock held by them, subject, in the case of any member, to prior settlement of all outstanding claims by the Corporation against such member. Such distribution shall be made at such times, in such currencies, and in cash or other assets as the Corporation shall deem fair and equitable. The shares distributed to the several members need not necessarily be uniform in respect of the type of assets distributed or of the currencies in which they are expressed.

(d) Any member receiving assets distributed by the Corporation pursuant to this Section shall enjoy the same rights with respect to such assets as the Corporation enjoyed prior to their distribution.

ARTICLE VI

STATUS, IMMUNITIES AND PRIVILEGES

SECTION 1. *Purposes of Article*

To enable the Corporation to fulfill the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Corporation in the territories of each member.

SECTION 2. *Status of the Corporation*

The Corporation shall possess full juridical personality and, in particular, the capacity:

- (i) to contract;
- (ii) to acquire and dispose of immovable and movable property;
- (iii) to institute legal proceedings.

SECTION 3. *Position of the Corporation with Regard to Judicial Proceedings*

Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. Such actions shall, however, be brought by members or persons acting for them deriving claims from members. The property and assets of the Corporation shall, wherever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of a final judgment against the Corporation.

SECTION 4. *Immunity of Assets from Seizure*

Property and assets of the Corporation, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action.

SECTION 5. *Immunity of Archives*

The archives of the Corporation shall be inviolable.

SECTION 6. *Freedom of Assets from Restrictions*

To the extent necessary to carry out the operations provided for in the Agreement and subject to the provisions of Article III, Section 5, and to other provisions of this Agreement, all property and assets of the Corporation shall be free from restrictions, regulations, controls and moratoria of any nature.

SECTION 7. *Privilege for Communications*

The official communications of the Corporation shall be accorded by each member the same treatment that it accords to the official communications of other members.

SECTION 8. *Immunities and Privileges of Officers and Employees*

All Governors, Directors, Alternates, officers and employees of the Corporation:

- (i) shall be immune from legal process with respect to acts performed by them in their official capacity;
- (ii) not being local nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members;
- (iii) shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members.

SECTION 9. *Immunities from Taxation*

(a) The Corporation, its assets, property, income and its operations and transactions authorized by this Agreement, shall be immune from all taxation and from all customs duties. The Corporation shall also be immune from liability for the collection or payment of any tax or duty.

(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Corporation to Directors, Alternates, officials or employees of the Corporation who are not local citizens, local subjects, or other local nationals.

(c) No taxation of any kind shall be levied on any obligation or security issued by the Corporation (including any dividend or interest thereon) by whomsoever held:

- (i) which discriminates against such obligation or security solely because it is issued by the Corporation; or
- (ii) if the sole jurisdictional basis for such taxation is the place of currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Corporation.

(d) No taxation of any kind shall be levied on any obligation or security guaranteed by the Corporation (including any dividend or interest thereon) by whomsoever held:

- (i) which discriminates against such obligation or security solely because it is guaranteed by the Corporation; or
- (ii) if the sole jurisdictional basis for such taxation is the location of any office or place of business maintained by the Corporation.

SECTION 10. *Application of Article*

Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Corporation of the detailed action which it has taken.

SECTION 11. *Waiver*

The Corporation in its discretion may waive any of the privileges and immunities conferred under this Article to such extent and upon such conditions as it may determine.

ARTICLE VII

AMENDMENTS

(a) This Agreement may be amended by vote of three-fifths of the Governors exercising four-fifths of the total voting power.

(b) Notwithstanding paragraph (a) above, the affirmative vote of all Governors is required in the case of any amendment modifying:

- (i) the right to withdraw from the Corporation provided in Article V, Section 1;
- (ii) the pre-emptive right secured by Article II, Section 2(d);
- (iii) the limitation on liability provided in Article II, Section 4.

(c) Any proposal to amend this Agreement, whether emanating from a member, a Governor or the Board of Directors, shall be communicated to the Chairman of the Board of Governors who shall bring the proposal before the Board of Governors. When an amendment has been duly adopted, the Corporation shall so certify by formal communication addressed to all members. Amendments shall enter into force for all members three months after the date of the formal communication unless the Board of Governors shall specify a shorter period.

ARTICLE VIII

INTERPRETATION AND ARBITRATION

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Corporation or between any members of the Corporation shall be submitted to the Board of Directors for its decision. If the question particularly affects any member of the Corpora-

shall not be entitled to appoint an Executive Director of the Bank, it shall be entitled to representation in accordance with Article IV, Section 4(g).

(b) In any case where the Board of Directors has given a decision under paragraph (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board of Governors, the Corporation may, so far as it deems necessary, act on the basis of the decision of the Board of Directors.

(c) Whenever a disagreement arises between the Corporation and a country which has ceased to be a member, or between the Corporation and any member during the permanent suspension of the Corporation, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Corporation, another by the country involved and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the International Court of Justice or some other authority as may have been prescribed by regulation adopted by the Corporation. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

ARTICLE IX

FINAL PROVISIONS

SECTION 1. *Entry into Force*

This Agreement shall enter into force¹ when it has been signed on behalf of not less than 30 governments whose subscriptions comprise not less than 75 percent of the total subscriptions set forth in Schedule A and when the instruments referred to in Section 2(a) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before October 1, 1955.

SECTION 2. *Signature*

(a) Each government on whose behalf this Agreement is signed shall deposit with the Bank an instrument setting forth that it has accepted this Agreement without reservation in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement.

(b) Each government shall become a member of the Corporation as from the date of the deposit on its behalf of the instrument referred to in paragraph (a) above except that no government shall become a member before this Agreement enters into force under Section 1 of this Article.

(c) This Agreement shall remain open for signature until the close of business on December 31, 1956, at the principal office of the Bank on behalf of the governments of the countries whose names are set forth in Schedule A.

(d) After this Agreement shall have entered into force, it shall be open for signature on behalf of the government of any country whose membership has been approved pursuant to Article II, Section 1(b).

¹July 20, 1956.

SECTION 3. *Inauguration of the Corporation*

(a) As soon as this Agreement enters into force under Section 1 of this Article the Chairman of the Board of Directors shall call a meeting of the Board of Directors.

(b) The Corporation shall begin operations on the date when such meeting is held.

(c) Pending the first meeting of the Board of Governors, the Board of Directors may exercise all the powers of the Board of Governors except those reserved to the Board of Governors under this Agreement.

DONE at Washington, in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to act as depository of this Agreement and to notify all governments whose names are set forth in Schedule A of the date when this Agreement shall enter into force under Article IX, Section 1 hereof.

[Signed] *International Bank for Reconstruction
and Development*

EUGENE R. BLACK
President

[Here follow signatures on behalf of Cuba, Panama, Costa Rica, Mexico, Dominican Republic, Honduras, Paraguay, Guatemala, Greece, Peru, Nicaragua, Colombia, Chile, Haiti, Ecuador, Pakistan, Iceland, India, the United Kingdom, Canada, Austria, and the United States.]

SCHEDULE A

SUBSCRIPTIONS TO CAPITAL STOCK OF THE INTERNATIONAL FINANCE CORPORATION

<i>Country</i>	<i>Number of Shares</i>	<i>Amount (in United States dollars)</i>
Australia	2,215	2,215,000
Austria	554	554,000
Belgium	2,492	2,492,000
Bolivia	78	78,000
Brazil	1,163	1,163,000
Burma	166	166,000
Canada	3,600	3,600,000
Ceylon	166	166,000
Chile	388	388,000
China	6,646	6,646,000
Colombia	388	388,000
Costa Rica	22	22,000
Cuba	388	388,000
Denmark	753	753,000
Dominican Republic	22	22,000

<i>Country</i>	<i>Number of Shares</i>	<i>Amount (in United States dollars)</i>
Ecuador	35	35,000
Egypt	590	590,000
El Salvador	11	11,000
Ethiopia	33	33,000
Finland	421	421,000
France	5,815	5,815,000
Germany	3,655	3,655,000
Greece	277	277,000
Guatemala	22	22,000
Haiti	22	22,000
Honduras	11	11,000
Iceland	11	11,000
India	4,431	4,431,000
Indonesia	1,218	1,218,000
Iran	372	372,000
Iraq	67	67,000
Israel	50	50,000
Italy	1,994	1,994,000
Japan	2,769	2,769,000
Jordan	33	33,000
Lebanon	50	50,000
Luxembourg	111	111,000
Mexico	720	720,000
Netherlands	3,046	3,046,000
Nicaragua	9	9,000
Norway	554	554,000
Pakistan	1,108	1,108,000
Panama	2	2,000
Paraguay	16	16,000
Peru	194	194,000
Philippines	166	166,000
Sweden	1,108	1,108,000
Syria	72	72,000
Thailand	139	139,000
Turkey	476	476,000
Union of South Africa	1,108	1,108,000
United Kingdom	14,400	14,400,000
United States	35,168	35,168,000
Uruguay	116	116,000
Venezuela	116	116,000
Yugoslavia	443	443,000
Total:	100,000	\$100,000,000

IRAQ-TURKEY

PACT OF MUTUAL CO-OPERATION¹

Signed at Bagdad, February 24, 1955; in force February 28, 1955

Whereas the friendly and brotherly relations existing between Iraq and Turkey are in constant progress, and in order to complement the contents of the Treaty of friendship and good neighbourhood concluded between His Majesty the King of Iraq and His Excellency the President of the Turkish Republic signed in Ankara on the 29th of March, 1946, which recognised the fact that peace and security between the two countries is an integral part of the peace and security of all the Nations of the world and in particular the Nations of the Middle East, and that it is the basis for their foreign policies;

Whereas Article 11 of the Treaty of Joint Defence and Economic Co-operation between the Arab League States² provides that no provision of that Treaty shall in any way affect, or is designed to affect any of the rights and obligations accruing to the contracting parties from the United Nations Charter;

And having realised the great responsibilities borne by them in their capacity as members of the United Nations concerned with the maintenance of peace and security in the Middle East region which necessitate taking the required measures in accordance with Article 51 of the United Nations Charter;³

They have been fully convinced of the necessity of concluding a pact fulfilling these aims, and for that purpose have appointed as their plenipotentiaries:

His Majesty King Faisal II,
King of Iraq;
His Excellency Al Farik Nuri As-Said,
Prime Minister;
His Excellency Burhanuddin Bash-Ayan,
Acting Minister for Foreign Affairs;
His Excellency Jalal Bayar,
President of the Turkish Republic;
His Excellency Adnan Menderes,
Prime Minister;
His Excellency Professor Fuat Koprulu,
Minister for Foreign Affairs;

who having communicated their full powers, found to be in good and due form, have agreed as follows:

¹ British Treaty Series, No. 39 (1956), Cmd. 9859. Parties to the Pact by accession are Great Britain, Iran and Pakistan.

² See 49 A.J.I.L. Supp. 53 (1955).

³ British Treaty Series, No. 67 (1946), Cmd. 7015.

ARTICLE 1

Consistent with Article 51 of the United Nations Charter the High Contracting Parties will co-operate for their security and defence. Such measures as they agree to take to give effect to this co-operation may form the subject of special agreements with each other.

ARTICLE 2

In order to ensure the realisation and effect application of the co-operation provided for in Article 1 above, the competent authorities of the High Contracting Parties will determine the measures to be taken as soon as the present Pact enters into force. These measures will become operative as soon as they have been approved by the Governments of the High Contracting Parties.

ARTICLE 3

The High Contracting Parties undertake to refrain from any interference whatsoever in each other's internal affairs. They will settle any dispute between themselves in a peaceful way in accordance with the United Nations Charter.

ARTICLE 4

The High Contracting Parties declare that the dispositions of the present Pact are not in contradiction with any of the international obligations contracted by either of them with any third State or States. They do not derogate from, and cannot be interpreted as derogating from, the said international obligations. The High Contracting Parties undertake not to enter into any international obligation incompatible with the present Pact.

ARTICLE 5

This Pact shall be open for accession to any member State of the Arab League or any other State actively concerned with the security and peace in this region and which is fully recognised by both of the High Contracting Parties. Accession shall come into force from the date on which the instrument of accession of the State concerned is deposited with the Ministry of Foreign Affairs of Iraq.

Any acceding State Party to the present Pact may conclude special agreements, in accordance with Article 1, with one or more States Parties to the present Pact. The competent authority of any acceding State may determine measures in accordance with Article 2. These measures will become operative as soon as they have been approved by the Governments of the Parties concerned.

ARTICLE 6

A Permanent Council at Ministerial level will be set up to function within the framework of the purposes of this Pact when at least four Powers become parties to the Pact.

The Council will draw up its own rules of procedure.

ARTICLE 7

This Pact remains in force for a period of five years, renewable for other five-year periods. Any Contracting Party may withdraw from the Pact by notifying the other Parties in writing of its desire to do so, six months before the expiration of any of the above-mentioned periods, in which case the Pact remains valid for the other Parties.

ARTICLE 8

This Pact shall be ratified by the Contracting Parties and ratifications shall be exchanged at Ankara as soon as possible. Thereafter it shall come into force from the date of the exchange of ratifications.

In witness whereof the said Plenipotentiaries have signed the present Pact in Arabic, Turkish and English, all three texts being equally authentic except in the case of doubt, when the English text shall prevail.

Done in duplicate at Bagdad this second day of Rajab 1374 Hijri corresponding to the twenty-fourth day of February, 1955.

NURI AS-SAID,

For His Majesty the King of Iraq.

BURHANUDDIN BASH-AYAN,

For His Majesty the King of Iraq.

ADNAN MENDERES,

For the President of the Turkish Republic.

FUAT KOPRULU,

For the President of the Turkish Republic.

EXCHANGE OF LETTERS ⁴

Baghdad, 24 February, 1955

Excellency,

In connection with the Pact signed by us to-day, I have the honour to place on record our understanding that this Pact will enable our two countries to cooperate in resisting any aggression directed against either of them and that in order to ensure the maintenance of peace and security in the Middle East region, we have agreed to work in close cooperation for effecting the carrying out of the United Nations resolutions concerning Palestine.

Accept, Excellency, the assurances of my highest consideration.

NURI AS-SAID

His Excellency Adnan Menderes,
Prime Minister of Turkey, Baghdad.

Baghdad, 24 February, 1955

Excellency,

I have the honour to acknowledge receipt of Your Excellency's letter of to-day's date, which reads as follows: [see above]

⁴ *Revue de Droit International pour le Moyen-Orient*, Vol. 4, No. 1 (August, 1955), p. 378.

I wish to confirm my agreement to the contents of the said letter.
Accept, Excellency, the assurances of my highest consideration.

ADNAN MENDLIRI.

His Excellency Nuri As-Said,
Prime Minister of Iraq, Baghdad.

UNITED KINGDOM—KINGDOM OF IRAQ

SPECIAL AGREEMENT

[With Exchanges of Notes]

Signed at Bagdad, April 4, 1955; in force April 5, 1955

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Iraq.

Considering that the United Kingdom intends to accede to the Pact of Mutual Co-operation between Iraq and Turkey signed at Bagdad on February 24, 1955;¹ and

Desiring as equal and sovereign partners in the Pact to make a Special Agreement in accordance with the provisions of Article 1 of the Pact;

Have agreed as follows:

ARTICLE 1

The two Contracting Governments shall maintain and develop peace and friendship between their two countries and shall co-operate for their security and defence in accordance with the Pact of Mutual Co-operation.

ARTICLE 2

The Treaty of Alliance between the United Kingdom and Iraq, signed at Bagdad on June 30, 1930,² with annexure and Notes exchanged, shall terminate from the date when the present Agreement comes into force.

ARTICLE 3

The Government of Iraq by the present Agreement undertake no obligations beyond the frontiers of Iraq.

ARTICLE 4

The Government of Iraq assume full responsibility for the defence of Iraq and will command and guard all defence installations in Iraq.

ARTICLE 5

In accordance with Article 1 of the Pact, there shall be close co-operation between the competent authorities of the two Governments for the

British Treaty Series, No. 50 (1955), Cmd. 9544.

¹ Misc. No. 5 (1955), Cmd. 9429; Treaty Series, No. 39 (1956), Cmd. 9859, printed above.

² British Treaty Series, No. 15 (1931), Cmd. 3797.

defence of Iraq. This co-operation shall include planning, combined training and the provision of such facilities as may be agreed upon between the two Contracting Governments for this purpose and with the object of maintaining Iraq's armed forces at all times in a state of efficiency and readiness.

ARTICLE 6

The Government of the United Kingdom shall, at the request of the Government of Iraq, do their best

- (a) to afford help to Iraq
 - (i) in creating and maintaining an effective Iraqi Air Force by means of joint training and exercises in the Middle East;
 - (ii) in the efficient maintenance and operation of such airfields and other installations as may from time to time be agreed to be necessary;
- (b) to join with the Government of Iraq in
 - (i) establishing an efficient system of warning against air attacks;
 - (ii) ensuring that equipment for the defence of Iraq is kept in Iraq in a state of readiness;
 - (iii) training and equipping Iraqi Forces for the defence of their country;
- (c) to make available in Iraq technical personnel of the British forces for the purpose of giving effect to the provisions of paragraphs (a) and (b) of this Article.

ARTICLE 7

Service aircraft of the two countries shall enjoy staging and over-flying facilities in each other's territories.

ARTICLE 8

In the event of an armed attack against Iraq or the threat of an armed attack which, in the opinion of the two Contracting Governments, endangers the security of Iraq, the Government of the United Kingdom at the request of the Government of Iraq shall make available assistance, including if necessary armed forces to help to defend Iraq. The Government of Iraq shall provide all facilities and assistance to enable such aid to be rapid and effective.

ARTICLE 9

(a) The present Agreement shall come into force on the date on which the United Kingdom becomes a party to the Pact.³

(b) The Agreement shall remain in force so long as both Iraq and the United Kingdom are parties to the Pact.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Agreement and have affixed thereto their seals.

³ The United Kingdom acceded to Turco-Iraqi Pact on April 5, 1955.

Done at Bagdad this 11th day of Shaban, 1374 Hijri, corresponding to the 4th day of April, 1955, in duplicate, in the English and Arabic languages, both texts being equally authentic except in cases of doubt when the English text shall prevail.

(L.S.) ROBERT H. TURTON. (L.S.) NOURRY SADE
(L.S.) MICHAEL WRIGHT. (L.S.) B. BASHAYAN

EXCHANGES OF NOTES

No. 1

The Iraqi Prime Minister to Her Majesty's Ambassador at Bagdad

(Translation)

*Office of the Prime Minister,
Bagdad, April 4, 1955*

Your Excellency,

I have the honour to refer to the Special Agreement signed to-day between the Government of Iraq and the Government of the United Kingdom, and to propose that the provisions set out in the Memorandum attached to this Note should be made for the purpose of giving effect to the Special Agreement.

I have the honour further to propose that, if those provisions are acceptable to the Government of the United Kingdom, this Note and attached Memorandum, together with your Excellency's reply, shall constitute an agreement between our two Governments, which shall come into force on the same date, and remain in force for the same period, as the Special Agreement, and that detailed arrangements shall be made accordingly between the competent authorities of the two Governments.

I avail myself of this opportunity to renew to your Excellency the assurance of my highest consideration.

NOURRY SADE.

MEMORANDUM ATTACHED TO NOTE NO. 1

1. (a) Command of Habbaniya, Shaiba and Margil shall pass as from the date of signature of the Special Agreement to the Government of Iraq and Iraqi officers of appropriate rank shall be appointed for this purpose on May 2, 1955.

(b) All flying units of the Royal Air Force now stationed in Habbaniya and Shaiba shall be withdrawn progressively, and their withdrawal shall be completed within one year after the date of signature of the Special Agreement.

(c) As the withdrawal of these flying units proceeds, the Government of the United Kingdom shall also progressively withdraw members of their technical and administrative personnel and personnel of authorised service

organisations until only those remain in Iraq who are required for the purpose of the Special Agreement and this Memorandum.

2. (a) Under the Special Agreement, British personnel shall be in Iraq to assist the Iraqi Forces with training and with the installation, operation and maintenance of facilities and equipment, and to service aircraft.

(b) The command and administration of British personnel and installations shall be the responsibility of the Government of the United Kingdom, and for this purpose the Government of the United Kingdom shall make available the necessary British staff to command and administer them under the overall authority of the Iraqi officer in charge of each establishment.

(c) The senior British officer appointed in each case shall act in close liaison with the Iraqi officer in command.

3. The provisions of the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty, signed in London on June 19, 1951,⁴ shall apply to the forces of each Government in the territories of the other Government. Detailed arrangements for the application of those provisions shall be made by the two Governments as soon as possible. Until such detailed arrangements have been made in Iraq, the provisions at present applicable to British forces there shall continue to apply.

4. (a) In accordance with Article 4 of the Special Agreement, the Government of Iraq shall assume responsibility for the protection of all airfields and installations in Iraq and to this end shall incorporate into the Iraqi Forces those members of the Royal Air Force Levies, Iraq, who wish to volunteer. The Government of the United Kingdom shall, for a limited period, make available for loan to the Iraqi forces British personnel, as far as possible from among those now serving with the Royal Air Force Levies, Iraq, to facilitate such transfer and integration.

(b) The two Governments shall use their best endeavours to ensure that as many as possible of the civilians at present employed at Habbaniya, Shaiba and Margil shall continue in employment there.

5. The Government of the United Kingdom undertake, in accordance with Article 6 (a) and (c) of the Special Agreement and in order to facilitate the closest co-operation between the air forces of the two countries, to do their best:

- (a) to provide expert advice and assistance in operational and technical matters, including the extension of Iraqi airfields, and in the construction of such additional airfields and facilities as may be agreed to be necessary;
- (b) to provide personnel to assist in the training of the Royal Iraqi Air Force and to offer continuous consultation regarding methods and techniques of training at all stages;
- (c) to arrange that Royal Air Force squadrons and other British aircraft shall make periodic visits to Iraq in accordance with the provisions

⁴ British Treaty Series, No. 3 (1955), Cmd. 9363; T.I.A.S., No. 2846; 48 A.J.I.L. Supp. 83 (1954).

of the Special Agreement and this Memorandum in particular for the purpose of joint training at all times;

- (d) to make available in Iraq British personnel for the servicing, maintenance and repair of British aircraft as well as for such aircraft services as it may be agreed that they should provide on the airfields jointly used by both parties;
- (e) to grant facilities, including instructional courses abroad, for training Iraqi personnel if suitable facilities are not available in Iraq;
- (f) to facilitate as far as possible the supply of necessary aircraft and associated equipment of modern design.

6. The Government of the United Kingdom shall do their best to join with the Government of Iraq in establishing as soon as possible an efficient system for anti-aircraft defence, including a radar warning system and a system for aircraft reporting. For these purposes the Government of the United Kingdom shall make available to the Government of Iraq the co-operation and advice of qualified service and technical personnel.

7. For the purposes of Article 8 of the Special Agreement, the Iraqi land forces shall be so trained as to facilitate closest co-operation with the land forces of the United Kingdom and suitably trained and experienced British personnel shall be made available to assist in the training of the Iraqi land forces and to attend and advise on field and other exercises. The Government of the United Kingdom shall do their best to facilitate the supply to the Government of Iraq of arms and other appropriate equipment of modern design.

8. The Government of the United Kingdom shall co-operate with the Government of Iraq in establishing in advance and maintaining to an agreed standard such maintenance installations, including tank repair facilities, as may be agreed to be necessary in the event of an armed attack for the Iraqi forces and British forces co-operating with them. Expert service advice on their siting and construction, and advice and assistance in their maintenance and manning, shall be made available by the Government of the United Kingdom.

9. (a) The Government of the United Kingdom shall make available, as may be agreed between the two Governments, the co-operation and advice of suitably qualified service and technical personnel with a view to the establishment of an organisation for mine watching and mine clearance on the Shatt el Arab.

(b) The Government of Iraq shall continue to permit British naval units to visit the Shatt el Arab at any time on previous notification being given.

10. The existing procedures and facilities under which aircraft under the control of the Royal Air Force overfly, land, refuel and are serviced in Iraq, shall be continued. Similar procedures shall apply and similar facilities shall be made available in the United Kingdom and its dependent territories to aircraft under the control of the Royal Iraqi Air Force.

11. (a) The Government of the United Kingdom shall join with the Government of Iraq in establishing in Iraq stocks of military stores and

equipment for use by the armed forces of the two countries for the defence of Iraq in the event of an armed attack against Iraq. These stocks shall be stored at sites in Iraq to be agreed between the competent authorities of the two Governments.

(b) The Government of Iraq shall provide the depots necessary for the safe keeping of those stocks and shall assume full responsibility for their security.

(c) For administrative purposes, stocks which are the property of the Government of Iraq shall be stored separately from those which are the property of the Government of the United Kingdom.

(d) Stocks shall be kept in a state of readiness at all times. Accordingly, provision shall be made for their maintenance, turn-over, inspection and periodical replacement, and each Government shall provide the personnel necessary for those purposes with respect to the stocks belonging to them.

(e) The Government of the United Kingdom may freely dispose of any items of such stocks, the property of the Government of the United Kingdom, which may become surplus to British requirements, subject to the offer of first refusal to the Government of Iraq in the case of any property to be disposed of in Iraq.

12. (a) The Government of Iraq shall make available essential services for the use of British personnel and shall, if necessary, allocate suitable accommodation for them and their families.

(b) Where new installations are from time to time agreed to be necessary for the purposes of the Special Agreement and this Memorandum, the terms of their provision shall be agreed between the two Governments.

No. 1A

Her Majesty's Ambassador at Bagdad to the Iraqi Prime Minister

*British Embassy,
Bagdad, April 4, 1955.*

Your Excellency,

I have the honour to acknowledge the receipt of your Excellency's Note of to-day's date proposing that the provisions set out in the Memorandum attached to your Excellency's Note should be made for the purpose of giving effect to the Special Agreement signed to-day between the Government of Iraq and the Government of the United Kingdom.

I have the honour, in accepting the provisions, to confirm that your Excellency's Note, together with this Note in reply, shall constitute an agreement between our two Governments on the terms of those provisions, which shall come into force on the same date, and remain in force for the same period, as the Special Agreement, and I have the honour to agree to your Excellency's further proposal that detailed arrangements shall be made accordingly between the competent authorities of the two Governments.

I have, etc.

MICHAEL WRIGHT.

No. 2

The Iraqi Prime Minister to Her Majesty's Ambassador at Bagdad

(Translation)

*Office of the Prime Minister,
Bagdad, April 4, 1933.*

Your Excellency,

I have the honour to refer to the Special Agreement signed to-day between the Government of Iraq and the Government of the United Kingdom and to our Notes 1 and 1A exchanged this day, and to propose that the provisions set out in the Memorandum attached to this Note should be made for the purpose of giving effect to the Special Agreement and to those Notes.

I have the honour further to propose that, if those provisions are acceptable to the Government of the United Kingdom, this Note and the attached Memorandum, together with your Excellency's reply, should constitute an agreement between our two Governments, which shall enter into force on the same date, and remain in force for the same period, as the Special Agreement.

I avail myself of this opportunity to renew to your Excellency the assurance of my highest consideration.

NOURY SAH

MEMORANDUM ATTACHED TO NOTE NO. 2

(a) All immovable property now in British ownership shall continue in British ownership or be handed over to the Government of Iraq, or be freely disposed of by the Government of the United Kingdom. Certain installations that will serve the needs of both Governments shall be handed over to the Government of Iraq free of charge. All other immovable property handed over to the Government of Iraq as above shall be paid for at its *in situ* value.

(b) Where installations have been handed over free of charge the Government of the United Kingdom shall enjoy full rights of free user. Where the Government of Iraq have paid for immovable property, they shall be entitled to make a reasonable charge, to be settled by agreement, for its subsequent use by the Government of the United Kingdom.

(c) Each Government shall be responsible for the operation and the maintenance of immovable property in their ownership. The two Governments shall agree on the standards to be observed and, in appropriate cases, the apportionment of the cost, in respect of the operation and maintenance of the installations which serve the needs of both Governments.

(d) Movable property required for operation of any property handed over under paragraph (a) above shall be paid for by the Government of Iraq at full cost, if new, and, if used, at a fair valuation. The Government of the United Kingdom shall retain all other movable property and shall have the right to dispose of it in Iraq or elsewhere.

(e) The Government of Iraq will bear the cost of their air warning system and of improving their military airfields to standards to be agreed.

(f) Each Government shall meet the cost of their own forces and any civilian personnel employed by them, except that the cost to the Government of Iraq of British personnel loaned or seconded to the Iraqi Forces shall be mutually agreed.

(g) Any other financial questions shall be settled by agreement between the two Governments.

No. 2A

Her Majesty's Ambassador at Bagdad to the Iraqi Prime Minister

*British Embassy,
Bagdad, April 4, 1955.*

Your Excellency,

I have the honour to acknowledge the receipt of your Excellency's Note of to-day's date referring to the Special Agreement signed to-day between the Government of Iraq and the Government of the United Kingdom and to our Notes 1 and 1A exchanged this day, in which your Excellency proposes that the provisions set out in the Memorandum attached to your Excellency's Note should be made for the purpose of giving effect to the Special Agreement and to those Notes.

I have the honour, in accepting the provisions, to confirm that your Excellency's Note, together with this Note in reply, shall constitute an agreement between our two Governments on the terms of those provisions, which shall enter into force on the same date, and remain in force for the same period, as the Special Agreement.

I have, etc.

MICHAEL WRIGHT.

No. 3

Her Majesty's Ambassador at Bagdad to the Iraqi Prime Minister

*British Embassy,
Bagdad, April 4, 1955.*

Your Excellency,

From our recent conversations your Excellency is aware that the Government of the United Kingdom are concerned to do anything in their power to assure the future of the members of the Royal Air Force Levies, Iraq, and the civilian employees at the bases who have served with them for so long. For this purpose the Government of the United Kingdom have decided to take the following measures—

- (a) in the case of the Levies to make suitable arrangements for pensions and gratuities and for their commutation;

- (b) in the case of civilian employees to award them gratuities where justified by length of service;
- (c) for both the Levies and the civilian employees to institute as soon as possible suitable facilities at the bases for vocational training in certain trades for those who are willing and capable of finding employment elsewhere in Iraq;
- (d) in appropriate cases not adequately covered by (a), (b) or (c) above to consider making grants towards resettlement in Iraq.

I feel certain that your Excellency will welcome these measures and that I can rely upon your help for the working out by the Government of the United Kingdom of the measures in (c) and (d) above.

I have, etc.

MICHAEL WRIGHT

No. 3A

The Iraqi Prime Minister to Her Majesty's Ambassador at Bagdad

(Translation)

*Office of the Prime Minister,
Bagdad, April 4, 1955.*

Your Excellency,

I thank you for your letter of to-day's date in which you inform me of the measures proposed to be taken by the Government of the United Kingdom in connexion with the Royal Air Force Levies, Iraq, and civilian employees at the bases.

In reply I wish to state that I welcome these proposals and will help in the manner you have suggested.

I avail myself of this opportunity to renew to your Excellency the assurance of my highest consideration.

NOURY SAID

EXCHANGE OF NOTES REFERRING TO THE SPECIAL AGREEMENT SIGNED AT
BAGDAD ON THE 4TH OF APRIL, 1955

Bagdad, December 20, 1955 *

No. 1

Her Majesty's Ambassador at Bagdad to the Prime Minister of Iraq

*British Embassy, Bagdad,
December 20, 1955.*

Your Excellency,

I have the honour to refer to the negotiations which have taken place for the implementation of the Special Agreement signed on the 4th of April,

* British Treaty Series, No. 7 (1956), Cmd. 9772.

1955 between the Government of Iraq and the Government of the United Kingdom of Great Britain and Northern Ireland.¹ The Government of the United Kingdom desire to express their appreciation of the spirit of co-operation and good faith in which these negotiations have been conducted. As partners with the Government of Iraq in the Bagdad Pact² and as fellow members of the Council which has now held its first meeting, they wish to take further measures to develop friendship and co-operation between our two countries for the fulfilment of the common objectives of the members of the Bagdad Pact.

2. In the negotiations mentioned above the Government of Iraq and the Government of the United Kingdom have reached agreement, as part of the financial arrangements in fulfilment of the provisions of paragraph (a) of the Memorandum attached to Note No. 2 of the 4th of April, 1955, which referred to the Special Agreement, that the sum of £2,755,000 is payable by the Government of Iraq to the Government of the United Kingdom. This sum is made up as follows:

- (a) the sum of £1,375,000 payable in respect of property transferred or received from British ownership to be handed over to the Government of Iraq in accordance with the provisions of the Memorandum attached to Note No. 2. This property, and the agreed value thereof, consists of the following:

Buildings at Habbaniya valued at:	£500,000
Civil cantonments valued at:	£ 90,000
Buildings and fixed installations at Shaiba valued at: ..	£430,000
Buildings and fixed installations at Basra valued at: ...	£355,000

and

- (b) the sum of £1,380,000 payable for the freehold land at Basra owned by the Government of the United Kingdom.

Detailed lists of the items included in sub-paragraphs (a) and (b) above will be agreed between our representatives.

3. In this connexion I have the honour to make the following proposals:

- (a) The Government of the United Kingdom shall waive payment of the sum of £2,755,000 referred to above and shall accept as full satisfaction of the obligation of the Government of Iraq to make that payment the fulfilment by the Government of Iraq of the provisions in sub-paragraphs (b) and (c) of this paragraph;
- (b) The Government of Iraq shall devote the sum of £2,755,000 to the following purposes in 1956 and 1957:
- (i) a sum of at least £2,000,000 to be spent on the purchase in the United Kingdom of arms, equipment and defence stores;
 - (ii) the remainder to be used towards the expenses of training Iraqi personnel in British establishments and the expense to

¹ Treaty Series, No. 50 (1955), Cmd. 9544, printed above, p. 505.

² See Misc. No. 5 (1955), Cmd. 9429; Treaty Series, No. 39 (1956), Cmd. 9859, printed above, p. 502.

the Government of Iraq of Iraqi personnel taking part in training between the forces of the United Kingdom and Iraq.

(c) The Government of the United Kingdom shall accept the offer made by the Government of Iraq to:

- (i) make available at the Port of Basra free storage (including cold storage), and free accommodation and services for the British Service personnel who may at any time be at the Port of Basra in accordance with existing agreements;
- (ii) continue to offer the existing free facilities to British Naval units visiting the Shatt-el-Arab in accordance with the provisions of paragraph 9 (b) of the Memorandum attached to Note No. 1 of the 4th of April, 1955, which referred to the Special Agreement;
- (iii) offer free services, accommodation and aircraft handling to Royal Air Force visits to Shaiba from time to time.

4. I have the honour further to propose that, if the proposals set out in paragraph 3 above are acceptable to the Government of Iraq, the Note, together with your Excellency's reply, shall constitute an agreement between our two Governments which shall enter into force immediately.

5. I have, etc.

MICHAEL WRIGHT

The Prime Minister of Iraq to Her Majesty's Ambassador at Bagdad
(English version)

*Council of Ministers,
Bagdad, December 20, 1955*

Your Excellency,

I have the honour to acknowledge receipt of your Excellency's Note of to-day's date referring to the negotiations which have taken place for the implementation of the Special Agreement signed on the 4th of April, 1955, between the Government of Iraq and the Government of the United Kingdom of Great Britain and Northern Ireland. I have the honour, in accepting the proposals in your Excellency's Note, to confirm that the Note, together with this Note in reply, shall constitute an Agreement between our two Governments which shall enter into force immediately.

I avail, etc.

NOURY SAID.

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TOWARDS THE RULE OF LAW?

UNITED STATES REFUSAL TO SUBMIT TO ARBITRATION OR CONCILIATION THE INTERHANDEL CASE

BY HERBERT W. BRIGGS

Editor-in-Chief

On January 11, 1957, the United States rejected a request of the Government of Switzerland to submit the *Interhandel* controversy to arbitration or conciliation in conformity with the provisions of the United States-Swiss Treaty of Arbitration and Conciliation of February 16, 1931.¹ The refusal to submit the controversy to arbitration was declared to be "on the ground that the matter does not involve a dispute falling within the scope of the obligation to have recourse to arbitration";² and the refusal to comply with the conciliation provisions of the treaty was on the ground that they "would necessarily be unproductive."³

In elaborating its reasons for refusing to submit the controversy to international proceedings, the United States Department of State concurred in advocating the following propositions in the circumstances of the controversy:

1. That the more restrictive reservation first made in 1946 by the United States in accepting the compulsory jurisdiction of the International Court of Justice of "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America*"⁴ should be read retroactively into Article VI(a) of the U. S.-Swiss treaty of 1931, which, in terms, merely excepted from arbitration "any difference the subject matter of which (a) is within the domestic jurisdiction of either of the Contracting Parties."

2. That the disposition of title to property within a state is not subject to arbitration because it is within the exclusive domestic jurisdiction of that state unless removed "by sovereign act."⁵

3. That a state may set up its constitution and laws to provide an interpretation, binding on the other party, of what it has agreed to by treaty.

4. That a state may set up its constitution and laws as an excuse for failure to fulfil a treaty obligation.

¹ See 36 Dept. of State Bulletin 350-358 (1957), for texts of Swiss note of Aug. 9, 1956, and U. S. note of Jan. 11, 1957, with enclosed U. S. Memorandum. For the text of the 1931 treaty, see U. S. Treaty Series, No. 844.

² U. S. note, *loc. cit.* 351.

³ U. S. Memorandum, *loc. cit.* 357.

⁴ Italics added. For full text, see T.I.A.S., No. 1598.

⁵ U. S. Memorandum, *loc. cit.* 357.

5. That the interpretation of a treaty is a question falling within the domestic jurisdiction of a state.

6. That whether or not a state has violated the provisions of a treaty is a domestic question for purposes of a treaty providing for arbitration or conciliation.

SUMMARY OF INTERHANDEL CASE

Although it is not the purpose of this article to discuss the merits of the *Interhandel* case, a summary of the complicated facts⁶ of that case will throw light upon the refusal of the United States to submit it to arbitration or conciliation. "Interhandel," also known as "Société Internationale pour Participations Industrielles et Commerciales, S. A.," was originally founded in 1928 as a Swiss holding corporation domiciled in Basel, Switzerland, under the name of "I. G. Chemie." I. G. Chemie, later Interhandel, owned 90% of the capital stock, including assets now in excess of \$100,000,000, of General Aniline and Film Co., an operating company organized under the laws of Delaware.

Between 1942 and 1946, all of the American assets of Interhandel, including its shares in General Aniline and Film Co., were vested under the Trading with the Enemy Act⁷ by the U. S. Alien Property Custodian as beneficially owned or controlled by an enemy (German) corporation, I. G. Farben. It was the contention of the United States that Interhandel was enemy or enemy-tainted under United States law because through the years it had participated in a conspiracy with the Sturzenegger Swiss banking firm and I. G. Farben to conceal and cloak the ownership and control by I. G. Farben, an enemy German concern, of properties and interests in many countries, and to allow Farben to control such properties.

In 1948, Interhandel brought suit in the U. S. District Court for the District of Columbia for recovery of its American assets, including the shares of General Aniline, under Sec. 9(a) of the Trading with the Enemy Act, alleging that it was not and had not been an enemy or ally of an enemy. During the course of the proceedings, the court granted motions for reciprocal discovery of documents. Interhandel examined and photostated over 23,000 documents of the U. S. Department of Justice; but two weeks before plaintiff was to make discovery, the Swiss Government seized the files and books of Sturzenegger, a Swiss corporation, and refused Interhandel permission to produce them in an American court because so to do would be a violation of Article 273 of the Swiss Penal Code, relative to economic espionage, and Article 47 of the Swiss Bank Law, relative to banking secrecy. The result was that Interhandel was able to produce some, but not all, of the Interhandel records and none of the Sturzenegger

⁶ These facts are here summarized from the opinions of the U. S. courts in *Société Internationale pour Participations Industrielles et Commerciales, S. A., v. McGranery et al.*, 111 F. Supp. 435 (1953) and, on appeal, [Same] *v. Brownell*, 225 F. 2d 532 (1955), cert. den., U. S. Supreme Court, 350 U. S. 937 (1956), and from the U. S. Memorandum of Jan. 11, 1957, *loc. cit.*

⁷ 40 Stat. 411; 50 U. S. C., Appendix, § 1 *et seq.*

records ordered produced by the court. After appointment of a Special Master, who found, *inter alia*, that there was no evidence of collusion between Interhandel and the Swiss Government with reference to non-production of the records, the District Court dismissed, with prejudice, Interhandel's suit for recovery on the ground that the court must uphold established procedures of the American judicial system for compelling the production of all relevant facts in order that justice be done; and that no denial of due process of law arose here from the fact that plaintiff's inability to produce the documents was due to the action of the Swiss Government. The dismissal was affirmed on the same grounds by the Court of Appeals of the District of Columbia, and certiorari was denied by the Supreme Court on January 9, 1956.⁸

THE SWISS REQUEST FOR ARBITRATION OR CONCILIATION

In its note of August 9, 1956, the Swiss Government contended, *inter alia*, that "the latest American court decisions in this matter . . . have been restricted to mere procedural grounds"; that the American assets of Interhandel "have to this date not been returned to their rightful owners"; that "all attempts of the Swiss owners to obtain the return of their property have so far remained unsuccessful"; that the matter turned upon "the principles of international law pertaining to the protection of the legitimate interests of a neutral State"; that "the matter involves reference to an agreement concluded between the Governments of the two countries"; and that the two governments had long been in dispute as to the proper interpretation of that international agreement. The Swiss Government therefore requested the United States to submit the matter to arbitration or conciliation in accordance with the provisions of the United States Swiss Treaty of Arbitration and Conciliation of 1931.⁹

The international agreement which the Swiss Government charges the United States with violating is the Swiss-Allied Accord concluded at Washington, May 25, 1946, by exchange of notes.¹⁰ Article IV(1) of the Washington Accord provides:

The Government of the United States will unblock Swiss assets in the United States. The necessary procedures will be determined without delay.

In its note of August 9, 1956, the Swiss Government observed with reference to the American assets of Interhandel:

See citations in note 6 above. The New York Times reported on April 12, 1957, that the Court of Appeals of the District of Columbia had on April 11 affirmed a denial of injunction requested by Interhandel to restrain sale by the U. S. of 75% of the stock of General Aniline, the U. S. contention being that litigation has been terminated. On April 17, 1957, Attorney General Brownell nevertheless postponed the sale pending further litigation. *Ibid.*, April 18, 1957, p. 41.

⁹ Swiss note, *loc. cit.* 358.

¹⁰ See 14 Dept. of State Bulletin 1121-1124 (1946). The Swiss-Allied Accord does not appear to have been published either in T.I.A.S. or U.N.T.S. For a discussion of this agreement, see article by Nat B. King in 46 A.J.I.L. 464 (1952).

The Federal Council is of the opinion that the refusal of the United States Government to return these assets is contrary to Article IV, paragraph 1, of the Swiss-Allied Accord of May 25, 1946.

For the reasons mentioned above and because the "repeated suggestions" of the Swiss Government, particularly in its diplomatic notes of December 1, 1954, and March 1, 1955, had "remained without positive reaction on the part of the United States Government, so that no other way remains open for the preservation of the interests in question," the Swiss Government felt compelled "to submit the matter to settlement by international proceedings."

The subject matter of the difference between Switzerland and the United States thus appears, in the opinion of the Swiss Government, to be governed by (unspecified) principles of international law relating to seizure of neutral property and "the protection of the legitimate interests of a neutral State"; and by a treaty (the 1946 Washington Accord), the interpretation of which had "over a long period of time" been in dispute between the two governments, and which the Swiss Government charged the United States with having contravened.

THE 1931 TREATY

The Treaty of Arbitration and Conciliation between the United States and Switzerland was signed in Washington, February 16, 1931, and, after ratification was advised by the United States Senate on April 29, 1932, ratifications were exchanged on May 23, 1932.¹¹ The treaty was one of the series of so-called "Kellogg Arbitration Treaties"¹² which were concluded contemporaneously by the United States with some twenty-seven states, but differed from most of them by including in one treaty provisions for conciliation as well as for arbitration.

Aside from the Preamble, which recites in part that the Contracting Parties are "desirous moreover of reaffirming the adherence of the two countries to the principle of submitting to impartial decision all juridical controversies in which they may become involved," the pertinent provisions of the treaty are as follows:

ARTICLE I

Every dispute arising between the Contracting Parties, of whatever nature it may be, shall, when ordinary diplomatic proceedings have failed, be submitted to arbitration or to conciliation, as the Contracting Parties may at the time decide.

ARTICLE II

Any dispute which has not been settled by diplomacy and in regard to which the Contracting Parties do not in fact have recourse to

¹¹ U. S. Treaty Series, No. 844.

¹² This particular treaty, like several others upon which negotiations had been delayed, was signed by Secretary of State Henry L. Stimson. See U. S. Foreign Relations, 1928, Vol. III, pp. 937-939; *ibid.*, 1931, Vol. II, pp. 1019-1026.

adjudication by an arbitral tribunal shall be submitted for investigation and report to a Permanent Commission of Conciliation constituted in the manner hereinafter prescribed.

ARTICLE IV¹³

.

The Contracting Parties reserve the right to act independently on the subject matter of the dispute after the report of the [Conciliation] Commission shall have been submitted.

ARTICLE V

The Contracting Parties bind themselves to submit to arbitration every difference which may have arisen or may arise between them in the virtue of a claim of right, which is juridical in its nature, provided that it has not been possible to adjust such difference by diplomacy and that it has not in fact been adjusted as a result of reference to the Permanent Commission of Conciliation constituted pursuant to Articles I and III of this Treaty.

ARTICLE VI

The provisions of Article V shall not be invoked in respect of any difference the subject matter of which

(a) is within the domestic jurisdiction of either of the Contracting Parties. . . .¹⁴

THE UNITED STATES REFUSAL TO ARBITRATE THE DIFFERENCE

The dominant theme of the U. S. Memorandum in which the United States rejects the Swiss request for arbitration or conciliation of the *Interhandel* dispute is the assertion that the subject matter of the difference is within the domestic jurisdiction of the United States because of the unilateral interpretations placed by the United States Government upon Article IV (1) of the Swiss-Allied Accord of 1946 and Article VI (a) of the U. S.-Swiss Arbitration and Conciliation Treaty of 1931. Since the Swiss Government challenges the interpretations placed upon these two treaties by the United States Government, the subject matter of the difference between the two governments is one of treaty interpretation and as such cannot be within the exclusive domestic jurisdiction of one of the parties. The United States seeks to avoid this dilemma by arguing that, to the extent the treaties of 1946 and 1931 deal with the question at all, they confirm the domestic jurisdiction of the United States in the *Interhandel* controversy and thus give rise to no obligation to submit the matter to arbitration.

Furthermore, the U. S. Memorandum argues that *Interhandel's* shares in General Aniline and Film Co., an American corporation, had been vested,

¹³ Last paragraph only.

¹⁴ Three further exceptions are omitted here as irrelevant. The French text of Art. VI(a) reads as follows: "Les dispositions de l'article V ne pourront être invoquées dans tout différend dont l'objet a) relève de la compétence *exclusive* de l'une ou l'autre des parties contractantes." Italics added.

pursuant to United States law, as enemy property, *viz.*, property of I. G. Farben, a German corporation; that Interhandel's suit in the United States courts for recovery of its American assets had been properly dismissed for failure to comply with the court order for discovery of the Sturzenegger records; and that since Interhandel had received full justice and due process of law in United States courts—although its claim had been properly dismissed—no denial of justice existed and there was no legal basis in this respect for an international claim by Switzerland against the United States.¹⁵

With reference to the Swiss claim based upon Article IV (1) of the Washington Accord of 1946, the United States regretted (*i.e.*, admitted) "that the Interhandel case and the interpretation of the provisions of the Swiss-Allied Accord have so long represented sources of disagreement between the United States and Switzerland."¹⁶ Instead, however, of regarding this dispute as to the interpretation of a treaty and its application to the *Interhandel* case as removing the matter from the sphere of its exclusive domestic jurisdiction, the United States proceeds to argue that the Swiss interpretation of the 1946 Accord is incorrect and that Article IV (1) does not and was never intended to apply to the *Interhandel* case. In its elaborate arguments, the United States has recourse to the history of the negotiations, the intent of the parties, the *travaux préparatoires*, the meaning of the terms employed, subsequent interpretations of the instrument—in fact, to methods traditionally employed where the subject matter of a difference between states relates to the interpretation of a treaty.

In reply to a Swiss argument, previously advanced,¹⁷ that by a decision of the Swiss Compensation Office in 1947, approved by the Swiss Authority of Review in 1948, Interhandel had been found to be a Swiss concern and not German-owned or controlled, and that since this decision was pursuant to the Swiss-Allied Accord of 1946, it was binding on the United States which was, in consequence, obligated to release Interhandel's assets in the United States as Swiss assets within the meaning of Article IV (1) of that Accord, the United States challenged the applicability of the Accord to Interhandel on several grounds.

First, the United States denied that the decisions of the Swiss Compensation Office and the Swiss Authority of Review were proceedings under the 1946 Accord; they were Swiss proceedings releasing Interhandel from a domestic, Swiss blocking of its assets under a Swiss decree of 1945; and, although made by Swiss organs which also had functions under the Swiss-Allied Accord of 1946, they "cannot be considered to bind anyone" under that Accord.¹⁸

Secondly, under the 1946 Accord, the authority of the Swiss Compensation Office and Authority of Review was limited to German property

¹⁵ U. S. Memorandum, *loc. cit.* 351, 352, 356.

¹⁶ U. S. note, *loc. cit.* 350.

¹⁷ Cf. U. S. Memorandum, *loc. cit.* 352, which refers to earlier exchanges of notes between the United States and Switzerland, although their texts are not reproduced in the Department of State Bulletin.

¹⁸ U. S. Memorandum, *loc. cit.* 352-353.

Switzerland; they had no authority under the Accord to "deal with the title to German [*sic*] property in the United States." It was clear, agreed the United States, "that only German assets located in Switzerland were the concern of the negotiators [of the Accord] and their Governments. It is true that "Article IV, though included in the Accord, dealt with a purely bilateral matter between the United States and Switzerland, and not the unblocking of Swiss assets in the United States," but this "related to an entirely separate matter" and "was not germane to the scheme represented by the rest of the Accord."¹⁹

Thirdly, argued the United States, even if it be assumed (which the United States denied) that the Swiss decisions that Interhandel was Swiss and not German-owned or controlled had been made under the 1946 Accord and that the decisions legally bound the United States, the United States could not accept the assumption of the Swiss Government that "Interhandel being Swiss, its American assets are Swiss," and that Article IV (1) of the 1946 Accord, by which the United States had agreed to "unblock Swiss assets in the United States," would require them to release Interhandel's American assets.²⁰ Article IV (1), contended the United States, did not obligate the United States to release "any 'Swiss' assets such as these, claimed to be Swiss though vested in the United States as enemy," but only "property admittedly Swiss" or recognized by the United States to be "legitimate Swiss assets."²¹

Moreover, under United States law, the vesting of enemy property transferred title to the United States; and under Article IV, Section 1, of the United States Constitution, it was argued, only Congress has the Constitutional power to dispose of property belonging to the United States. Therefore, continued the U. S. Memorandum, the American negotiators of the Swiss-Allied Accord of 1946 had no authority, nor could they legally or Constitutionally have agreed, to transfer or to submit the title of property of the United States to an arbitral decision which might require the transfer of such property without the consent of the U. S. Congress. The Swiss interpretation of the 1946 Accord thus went "beyond any possible construction" of its terms:

The assertion of a claim said to be based upon an international agreement, which clearly has no relation to the claim, cannot give rise to an obligation to arbitrate.²²

Except for its contention with reference to denial of justice, determination of the existence or non-existence of which would depend upon application of customary rules of international law, all of the arguments of the United States summarized above bear upon the applicability and interpretation of a treaty—the Swiss-Allied Accord of 1946. Even the argument based upon the alleged Constitutional *non possumus* with regard to property of the United States is one of treaty interpretation. The United States is arguing here, not that a Constitutional *non possumus* is a valid excuse

¹⁹ *Ibid.* 353–355.

²⁰ *Ibid.* 355.

²¹ *Ibid.* 355, 356.

²² *Ibid.* 355–357.

for failure to perform an international obligation, but that it would have been Constitutionally impossible for the American negotiators of the 1946 Accord to agree to terms bearing the construction placed upon them by the Swiss Government. The subject matter of the difference between the two governments is thus the applicability and interpretation of a treaty.

Turning now to the 1931 Treaty of Arbitration and Conciliation, the U. S. Memorandum argues that the Swiss request to submit the *Interhandel* controversy to arbitration "would put within the competence of arbitrators the power to dispose of property within the United States"; but "a dispute involving title to such property is not subject to arbitration" because, by Article VI (a) of the 1931 treaty, the

decision on what questions are within the domestic jurisdiction is, *under the Treaty*, made unilaterally by each party for itself, without any review or contest by others, who cannot be as fully appreciative of the nature of the domestic jurisdiction of a party as that party itself.²³

Moreover, since the "disposition of title to property located within a country is manifestly within the domestic jurisdiction of that country unless the country involved has by sovereign act removed the matter from its exclusive domestic jurisdiction," and since the United States has not removed the matter of the ownership of General Aniline's shares from its domestic jurisdiction either by the 1946 Accord or by any other act,

Now to agree that any body other than the United States courts acting under United States statutes has jurisdiction to rule on the ownership of the property here in question, would be to override and ignore the statutes enacted by Congress. These statutes provide the exclusive method, forum and standards for the return of property vested in the United States under the Trading with the Enemy Act. Under the Constitution of the United States as noted above the Executive Branch cannot dispose of property of the United States. It can only be disposed of by the Congress through appropriate statutes. It has already been pointed out that the negotiators for the Accord did not seek to bring about, and did not bring about, such an unconstitutional result. *This Government could not now do* what the negotiators were unable to do and did not do. As a consequence the United States deems the ownership of these shares is a matter "within the domestic jurisdiction" of the United States within the meaning of the Treaty, with the result that the arbitration provisions of the Treaty may not be invoked.²⁴

This is a curious argument. Is there an implication here that certain matters, such as the disposition of title to property within a state, are by their inherent nature within the exclusive domestic jurisdiction of a state? If so, the U. S. Memorandum admits that such matters may be removed from exclusive domestic jurisdiction "by sovereign act" (whatever that may mean) or by the conclusion of a treaty submitting the matter to arbitration. However, the United States denies having done so by the 1946 Accord or any other act and makes the strange assertion that, because of our municipal law and Constitution, not even the United States Government could agree to submit the *Interhandel* case to arbitration. Since,

²³ *Ibid.* 357. Italics added.

²⁴ *Ibid.* 357. Italics added.

However, we have concluded with Switzerland a treaty requiring the parties to submit to arbitration "every difference which . . . may arise between them by virtue of a claim of right, which is juridical in its nature" which has not been adjusted by diplomacy or conciliation and the subject-matter of which is not, *inter alia*, within the domestic jurisdiction of one of the parties, the United States is forced to argue not only that the *Extramarine Handel* case falls within its domestic jurisdiction, as determined by the Court, but also that it has the unilateral right to qualify its dispute with Switzerland as to the interpretation of the 1946 Accord as being within its exclusive domestic jurisdiction.

In reliance on its argument that no arbitrable question between Switzerland and the United States has arisen under the 1931 treaty, the U. S. Memorandum makes the assertion that "under the Treaty" the determination of whether or not a matter is within the domestic jurisdiction of a party is "made unilaterally by each party for itself." In fact, the 1931 treaty is silent on the point and contains no clause comparable to the one by which in 1946 the United States accepted the compulsory jurisdiction of the International Court of Justice subject to the exception of matters essentially within the domestic jurisdiction of the United States as determined by the United States of America.²⁵

Since the 1931 treaty is silent on the point, it becomes a question of treaty interpretation to determine whether the characterization of a matter as being within the domestic jurisdiction of a state is left by the treaty to each state or is governed by principles of international law. The 1931 Treaty of Arbitration and Conciliation with Switzerland was, as stated above, one of a series²⁶ of comparable treaties concluded by the United States over a short period of time. If due note be taken of variations of nomenclature in the treaties as finally drafted, the *travaux préparatoires* of many of these treaties throw light upon the purpose, intent and meaning of others in the series. Thus, the U. S. Memorandum, in discussing the meaning of the exception of domestic jurisdiction in the Swiss treaty, cites the *travaux préparatoires* of the comparable arbitration treaty with Belgium. Secretary of State Kellogg informed the Belgian Ambassador that the domestic jurisdiction exception to arbitration "pertains to the subject matter of disputes, not to whether they may, at any stage, be brought before a national tribunal of one of the Parties." He also stated:

The intended meaning covered only those cases which, *in international law*, are recognized as pertaining wholly to individual nations, concerning which each country must decide as to the propriety of its own acts.²⁶

²⁵ On April 25, 1928, Secretary of State Kellogg wrote to the American Ambassador in Turkey: "Modification of, or addition to, the texts of the treaties of arbitration and conciliation so as to meet the susceptibilities and apprehensions that are peculiar to one or more countries would render impossible execution of this Government's program for negotiating treaties of arbitration and conciliation which are substantially identical with governments outside of Latin America." U. S. Foreign Relations, 1928 Vol. XI, p. 47.

²⁶ Kellogg to DeLigne, March 8, 1929. U. S. Foreign Relations, 1929, Vol. IX, p. 4. Italics added.

During the course of negotiations for the arbitration treaty with Germany, the German Ambassador suggested that it would be desirable to interpret the domestic jurisdiction clause to mean

that this reservation is only applicable in cases where domestic jurisdiction is provided by International Law, *i.e.*, where the Law of Nations unrestrictedly leaves the matter to national jurisdiction.

After discussions with the Department of State, the German Ambassador expressed satisfaction with the following explanation, contained in an informal Memorandum of the Department of State, dated April 12, 1928, that the domestic jurisdiction exception

is intended to exclude from the scope of the treaty such questions as the incidence of domestic taxation, tariff, immigration of aliens and all matters of internal policy unless such matters contravene a treaty right between two countries. All such political questions are clearly within the purely domestic jurisdiction of the parties. This does not mean, of course, matters within the jurisdiction of domestic courts or tribunals but matters of purely national concern because wholly within the governmental control or competency of the two nations. [*sic*] If a question, however, is of international character and is a claim of right susceptible of decision by the application of the principles of law, of course the right of arbitration cannot be taken away by either country through self-serving legislation.²⁷

Contemporaneous negotiations for an arbitration treaty with Turkey failed because the Turkish Government, wishing to except from arbitration questions pertaining to the Armenians, proposed that the domestic jurisdiction exception provide that each party to the treaty decide for itself "whether any particular difference arising between them comes within the category of matters excluded from the competence of the arbitrators." In refusing to accept such a unilateral determination of domestic questions, Secretary Kellogg informed the Turkish Government that the U. S. Government

understands by the term "domestic jurisdiction" questions of sovereignty and all differences the settlement of which is left by international law to the exclusive competence of each state.²⁸

The writer has examined the published diplomatic correspondence relating to the so-called "Kellogg" treaties of arbitration proposed or concluded with Albania, Austria, Belgium, Bulgaria, China, Czechoslovakia, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Germany, Greece, Great Britain, Hungary, Iceland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Persia, Poland, Portugal, Rumania, Siam, Spain, Sweden, Switzerland, Turkey and Yugoslavia.²⁹ The evidence clearly indicates that the United States Government regarded international law as providing the criterion for the determination of whether or not a

²⁷ *Ibid.*, 1928, Vol. II, pp. 865-867.

²⁸ Kellogg to Grew, Oct. 9, 1928. U. S. Foreign Relations, 1928, Vol. III, pp. 949-950.

²⁹ See U. S. Foreign Relations volumes for 1928 to 1931, *passim*.

matter was within the domestic jurisdiction of a state. There is no hint or suggestion that the United States regarded the proposed arbitration treaties as permitting each party to the treaties to make a unilateral determination, conclusive on the other party, of the questions falling within its exclusive domestic jurisdiction.

Writing of the exception of domestic jurisdiction in arbitration treaties concluded during this period, Professor C. H. M. Waldoek has recently observed:

Although neither Covenant nor Statute contained a domestic jurisdiction clause in regard to arbitration and judicial settlement, the reservation of matters of domestic jurisdiction from the conciliation jurisdiction of the League in Article 15 (8) of the Covenant was not without its influence on arbitration and judicial settlement. The old sweeping formula of "matters affecting vital interests, independence or honour" disappeared in treaties of arbitration concluded after the Covenant came into force. Instead, there developed a tendency to borrow the domestic jurisdiction clause of Article 15 (8) and to insert it as a reservation both in treaties of arbitration and in unilateral declarations accepting the compulsory jurisdiction of the Court under the Optional Clause. . . .

If the application of a domestic jurisdiction clause was not to be largely subjective and thus seriously to undermine the jurisdiction created by the instrument, it was of crucial importance that the decision as to competence should not be left to the State concerned. Article 15 (8) . . . specifically placed the decision as to the validity or otherwise of a plea of domestic jurisdiction in the hands of the Council or Assembly. Where then did the decision lie under treaties of arbitration and in cases under the Optional Clause? About half the treaties of arbitration concluded during the League period, which contained a domestic jurisdiction reservation, specified that any difference of opinion as to a matter being one of domestic jurisdiction was to be decided *in preliminary proceedings* by the tribunal itself. The remainder were silent upon the point and there was at first some doubt whether the old principle, that the application of a reservation is within the discretion of the state invoking it, should still obtain or whether the point of jurisdiction should be decided by the tribunal. The latter view prevailed and rightly prevailed. . . .⁵⁰

There is thus cogent evidence for the view that a difference like that between the United States and Switzerland as to whether the 1931 treaty permits a unilateral characterization of matters of domestic jurisdiction cannot itself be a difference the subject matter of which is exclusively within the domestic jurisdiction of the United States. Involving as it does a difference which has arisen between them "by virtue of a claim of right, which is juridical in its nature," Switzerland and the United States have bound themselves by the 1931 treaty to submit it to arbitration, provided that it has not been adjusted by diplomacy or "has not in fact been adjusted as a result of reference" to the conciliation procedures of the treaty.

⁵⁰ C. H. M. Waldoek, "The Plea of Domestic Jurisdiction before International Legal Tribunals," 31 Brit. Yr. Bk. of Int. Law 96, 105-106 (1954). His citations are omitted here.

THE OBLIGATION TO SUBMIT TO CONCILIATION

Although by Article II of the 1931 treaty, the obligation to submit to conciliation "any dispute" which has not been settled by diplomacy or has not in fact been submitted to arbitration is absolute,³¹ and is not qualified by the exception of domestic jurisdiction, the United States has declined to comply with the conciliation provisions of the treaty on the following grounds: the purpose of the conciliation procedures was to enable the parties to compose differences arising from obscurity or lack of clarity as to the nature of a claim and its basis, but the positions of the two governments in the *Interhandel* controversy are fully and mutually understood; by the last paragraph of Article IV of the 1931 treaty, the report of the Conciliation Commission is not binding and the parties retain freedom of action; because the dispute falls within the domestic jurisdiction of the United States, the failure to adjust the difference by conciliation procedures could not lead to subsequent arbitration as contemplated in Article V; and finally

The Swiss Government has not set forth a claim falling within the scope of the 1946 Accord, and the question of title to shares, being a matter within the domestic jurisdiction of the United States, has been finally settled by the competent courts of the United States in proceedings the propriety of which is not questioned. Under the circumstances, and in the light of the Constitutional and statutory limitations regarding disposition of property of the United States referred to above, conciliation proceedings could not achieve the objectives of the conciliation provisions of the 1931 Treaty and would necessarily be unproductive. Therefore, the request for conciliation must be respectfully declined.³²

The Department of State is thus using the plea of domestic jurisdiction to reject arbitration prior to a resort to conciliation, to reject arbitration subsequent to a resort to conciliation, and—contrary to the terms of the treaty and our agreed interpretation thereof with Switzerland—to reject any resort to conciliation itself. Moreover, in refusing to comply with the conciliation provisions of the treaty, the United States is attempting to set up its Constitution and laws as an excuse for failure to fulfil its international obligations. The legal insufficiency of such an argument is too well established in international law to require extended comment. "It is certain," the Permanent Court of International Justice twice ob-

³¹ See above, p. 520, for text of Art. II. For the agreement of Secretary of State Stimson with the interpretation of the Swiss Government that "it is well understood, that for all conflicts not of a juridical character, or that would be excluded from arbitration by virtue of Article VI of the Treaty, recourse to the Commission of Conciliation would be obligatory in all cases, in conformity with Article II," see U. S. Foreign Relations, 1931, Vol. II, p. 1026, Stimson to Peter, Feb. 24, 1931.

³² U. S. Memorandum, *loc. cit.* 357. The United States likewise rejected a Swiss request for the maintenance of the *status quo* on the ground that since *Interhandel's* American assets had already been vested in the United States Government, the Swiss request was "in fact a request for a change of the *status quo*. . . . Only the courts of the United States have jurisdiction to stay such a sale of property located in the United States; such jurisdiction is sovereign and exclusive." *Ibid.* 358.

served in the *Free Zones Case* between France and Switzerland, "that France cannot rely on her own legislation to limit the scope of her international obligations."³³ In its Advisory Opinion of February 4, 1932, on the *Treatment of Polish Nationals in Danzig*, the same Court observed that

a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.³⁴

CONCLUSIONS

It is somewhat startling to find the Department of State employing in the year 1957 some of the arguments upon which it relies in the *Interhandel* controversy. The struggle for the over-all distribution of power which limits resort to the judicial settlement of international disputes between some states certainly does not prevail in the relations of the United States with Switzerland.³⁵ The refusal of the United States to submit either to arbitration or to conciliation the conflicting claims of right arising out of the *Interhandel* case ill accords with its professed advocacy of the rule of law in its international relations. Instead of relying on the thoroughly discredited proposition that a state may set up its constitution and laws as an excuse for failure to fulfill its international obligations; instead of laboring to prove that a dispute as to the interpretation or applicability of a treaty or as to whether it has been violated is a question within its exclusive domestic jurisdiction; instead of attempting to extend retroactively the stultifying effect of its domestic jurisdiction reservation to the compulsory jurisdiction of the International Court of Justice, would it not be more in conformity with the long-range interests of the United States and with the promotion of the rule of law if the United States frankly recognized its obligations under the 1931 treaty with Switzerland?

The obvious next step towards the rule of law should be for the United States to withdraw its limitative reservation to the compulsory jurisdiction of the International Court of Justice and to accept the jurisdiction of the Court to decide on the basis of international law whether, in a given case, a dispute falls within the domestic jurisdiction of the United States.

³³ P.C.I.J., Ser. A, No. 24, p. 12 (1930), and Ser. A/B, No. 46, p. 167 (1932).

³⁴ P.C.I.J., Ser. A/B, No. 44, p. 24 (1932). For further citations, see A.L. 23, Harvard Research in International Law, Draft Convention on the Law of Treaty 29 A.J.I.L. Supp. 1029-1044 (1935).

³⁵ See Hans Morgenthau, *Politics Among Nations* 404 ff. (2nd ed., 1951); Cf. De Visser, "Reflections on the Present Prospects of International Adjudication" 50 A.J.I.L. 467-474 (1956).

PASSAGE THROUGH THE SUEZ CANAL OF ISRAEL-BOUND CARGO AND ISRAEL SHIPS

BY LEO GROSS

Of the Board of Editors

I. INTRODUCTION

The purported nationalization of the Universal Company of the Suez Maritime Canal by the Egyptian Decree of July 26, 1956, refreshed the interest of the international community in the long-lingering dispute over restrictions imposed by Egypt on the passage of cargoes bound for Israeli ports and the prohibition of the passage of Israeli ships through the Suez Canal. At the 22-Power London Conference, August 16-23, 1956, representatives of several governments referred to these restrictions¹ and

it was pointed out that Egypt is in defiance, really, of a decision by the Security Council of the United Nations, taken in 1951 . . . which was reaffirmed again . . . in 1953, that under the terms of the Treaty of 1888 the Israeli shipping was entitled to go through and that Egypt was not entitled to bar it as it was doing.²

It is probably not altogether speculative to assume that it was with this situation in mind that the eighteen governments participating in the London Conference included in their Statement the following principle: "Insulation of the operation of the Canal from the influence of the politics of any nation."³ This principle, one of the six which were to form the basis of any settlement of the Suez question, was voted upon in the Security Council on October 13, 1956, and received unanimous approval.⁴

In the recent Middle East situation, which assumed the character of an acute crisis with the military action of Israel launched on October 29, 1956, to remove the bases of the guerrilla raiders in the Gaza strip, and which was followed by the combined Anglo-French action to secure the

¹ See remarks made by the representatives of France, New Zealand, Iran, Netherlands and India. The Suez Canal Problem, July 26-September 22, 1956, pp. 91, 112, 128, 145, 164 (State Dept. Pub. 6392).

² Secretary of State John Foster Dulles at the news conference Aug. 28, 1956. *Ibid.* 298. The statement by Mr. Dulles, which is inaccurate in part, was in response to the following question: "Mr. Secretary, was Israel's right of passage through the Suez (Canal) in any way discussed at the London Conference?"

³ *Ibid.* 308.

⁴ As adopted by the Security Council, principle (3) is phrased as follows: "The operation of the Canal should be insulated from the politics of any country." In this connection principle (1) is also directly relevant: "There should be free and open transit through the Canal without discrimination, overt or covert--this covers both political and technical aspects." Security Council, Official Records, 743rd Meeting, Oct. 13, 1956, p. 18, par. 105, and Doc. S/3671.

Canal, the restrictions imposed by Egypt in the Canal also played a significant rôle. The first resolution adopted on November 2, 1956, by the General Assembly during its First Emergency Special Session, urged that

upon the cease-fire being effective, steps be taken to reopen the Suez Canal and restore secure freedom of navigation.⁵

The Egyptian view that the state of war, initiated by Egypt on March 15, 1948, continued in spite of the General Armistice Agreement with Israel of February 24, 1949, and that Egypt derived from this certain rights of belligerency, namely, the right of visit, search and seizure, was an important element in the debates of the General Assembly and the negotiations leading to the withdrawal of Israeli troops from Egypt and the Gaza strip. It is not necessary to review in detail the various relevant statements. Suffice it to recall that President Dwight D. Eisenhower in his address to the nation of February 20, 1957, recalled that "Egypt ignored the United Nations in exercising belligerent rights in relation to Israeli shipping in the Suez Canal and in the Gulf of Aqaba." After noting that Egypt, "by accepting the Six Principles adopted by the Security Council last October in relation to the Suez Canal bound itself to free and open transit through the Suez Canal without discrimination, and to the principle that the operation of the Canal should be insulated from the politics of any country," he declared:

We should not assume that if Israel withdraws, Egypt will prevent Israeli shipping from using the Suez Canal or the Gulf of Aqaba. If, unhappily, Egypt does hereafter violate the Armistice Agreement or other international obligation, then this should be dealt with firmly by the society of nations.^{6a}

When announcing in the General Assembly, on March 1, 1957, the plans of her government for withdrawal from Egypt, the representative of Israel, Mrs. Golda Meir, declared with reference to the above statement: "This declaration has weighed heavily with my Government in determining its action today."⁶ However, neither the various resolutions adopted by the General Assembly in relation to the recent crisis nor the withdrawal of Israeli troops appear to have quieted public apprehension as to the continuation of Egypt's claim to belligerent rights. Repeated requests of the Government of Israel to secure assurances from Egypt through the office of the Secretary General of the United Nations, "to the mutual and full abstention from belligerent acts, by land, air and sea,"⁷ have been of no avail. The Secretary General reported to the General Assembly that

the Government of Egypt reaffirms its intent to observe fully the provisions of the Armistice Agreement to which it is a party, as indicated earlier in its acceptance (A/3266) of the 2 November resolution of the

⁵ Resolution 997 (ES-I). General Assembly, Official Records, First Emergency Special Session, Supp. No. 1, p. 2 (Doc. A/3354). ^{6a} 36 Dept. of State Bulletin 390 (1957).

⁶ New York Times, March 2, 1957, p. 10.

⁷ U.N. Doc. A/3527, Annex I: Aide-mémoire dated Feb. 4, 1957, transmitted to the Secretary General by the Permanent Representative of Israel to the United Nations.

General Assembly, on the assumption, of course, that observance will be reciprocal.⁸

A reaffirmation of this kind is of no practical value, since the Government of Egypt has at all times insisted that its restrictive practices and belligerent rights were compatible with the Armistice Agreement. It continued to do so even after the Security Council on September 1, 1951, called upon it to terminate such practices and declared that "neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search, and seizure for any legitimate purpose of self-defence."⁹ The position of the United States and other Members of the United Nations has also remained unchanged, and they continue to hold the view that Egypt, under the Armistice Agreement, does not possess belligerent rights.¹⁰ It may be noted, however, that the Security Council resolution of September 1, 1951, does not express this simple view directly. The Council may have deemed it unnecessary to labor the obvious after having rejected explicitly every one of the specific arguments marshaled by Egypt in support of its practices. It is nonetheless remarkable that neither the Council nor the Assembly has yet seen its way to declare clearly and unequivocally that, between Members of the United Nations, a state of war, after termination of hostilities, is incompatible with the Charter. This, it is submitted, appears from the legal point of view to be the most promising point of departure for resolving the controversy over the Egyptian restrictions in the Suez Canal.¹¹ The controversy since 1949 has been the focus of legal argument principally between Israel and Egypt, and since 1951 between Egypt and the Security Council, as the latter has made its own the principal theses advanced by Israel. These arguments and counter-arguments will now be examined.

II. EGYPTIAN RESTRICTIONS AND THEIR JUDICIAL JUSTIFICATION

On May 15, 1948, Egypt announced its "armed intervention in Palestine with a view to restoring law and order, and with the object of putting an end to acts of violence committed by the Zionist bands."¹² At the same

⁸ U.N. Doc. A/3527, Feb. 11, 1957, p. 6. Resolution 997 (ES-I), referred to above, urged "the parties to the armistice agreements promptly to withdraw all forces behind the armistice lines, to desist from raids across the armistice lines into neighbouring territory, and to observe scrupulously the provisions of the armistice agreements." Official Records, First Emergency Spec. Sess., Supp. No. 1, p. 2 (Doc. A/3354).

⁹ Official Records, 6th Year, 558th Meeting, Sept. 1, 1951, p. 2.

¹⁰ See, e.g., the statement by Secretary of State Dulles at his news conference March 26, 1957. 36 Dept. of State Bulletin 596 (1957).

¹¹ This paper is not concerned with the question of passage through the Straits of Tiran and the Gulf of Aqaba. Insofar as the restrictions practiced by Egypt in that area hinge juridically on the "state of war" doctrine, the arguments advanced with reference to the Suez Canal are equally applicable to it.

¹² *The Flying Trader*, Egypt, Prize Court of Alexandria, Dec. 2, 1950, Lauterpacht (ed.), *International Law Reports* 1950 (hereafter cited as 1950 Int. Law Rep.), p. 444. See also cablegram from the Minister of Foreign Affairs of Egypt to the President of the Security Council dated May 15, 1948, U.N. Doc. S/743; Security Council, Official Records, 3rd Year, No. 66, 292nd Meeting, May 15, 1948, p. 2.

When a state of siege was proclaimed, a shipping inspection service in the Ports of Alexandria, Port Said and Suez was established, and by Proclamation No. 38 of July, 1948, a Prize Court was set up. The Court was to "apply the rules of public international law, in their absence . . . it shall decide in accordance with the principles of equity."¹³

Nearly one year after the conclusion of the General Armistice Agreement with Israel, these regulations were consolidated in the decree issued by King Farouk I on February 6, 1950 "on the procedure of ship and airplane searches and of seizure of contraband goods in connection with the Palestine War."¹⁴ Article 2 provides for inspection by customs officers of the ship's manifest and cargo "so as to ensure that it contains no arms, munitions, war material or other articles considered war contraband and ships going directly to institutions or persons on Palestinian territory under Zionist control." Article 10 lists the categories of articles to be deemed war contraband, including fuel of every kind and "seized as prize." According to Article 3 of the decree,

force may at all times be used against any ship attempting to avoid search, where necessary by *firing* so as to *force* it to stop and submit to search. Where the search subsequently reveals that the ship is not carrying any contraband it shall be permitted to continue its voyage.

Article 4 provides that

if the crew of the ship resists the search by force, the ship shall be deemed to have lost its neutrality by reason of the hostile act. In that event the ship may be arrested, even if the search reveals that it was not carrying contraband and the cargo may be impounded for that reason, unless the owner proves his innocence.

The decree contains other rules customarily found in prize regulations, which are of no direct interest for the dispute. It is important, however, to stress the two facts: One is that the search is to be carried out by customs officials, and the other that force may be used, including firing, in order to force the ship to submit to search.

The representative of Israel also communicated to the Security Council an amendment to this decree, promulgated by the Council of Ministers on November 28, 1953, that is, more than four and one-half years after the conclusion of the Armistice Agreement. This amendment added to the list of contraband "foodstuffs and all other commodities which are likely to strengthen the war potential of the Zionists in Palestine in any way whatsoever." It also appeared to broaden the territorial applicability of the amended decree by providing as follows:

¹³ *The Fjeld*, Egypt, Prize Court of Alexandria, Nov. 4, 1950, 1950 Int. Law R. 345 at 346.

¹⁴ Text published in the Journal Officiel, No. 36, April 8, 1950. The English translation was submitted to the Security Council by the representative of Israel on Feb. 17, 1951, U.N. Doc. S/3179; Security Council, Official Records, 9th Year, Supp. Jan.-March, 1951, p. 6. The representative of Egypt referred to this decree as dated Feb. 9, 1950. Security Council, Official Records, 549th Meeting, July 26, 1951, p. 18, para. 60. Listed there the regulations promulgated earlier by Military Proclamations No. 3 of May 15, 1948, No. 13 of June 6, 1948, No. 38 of July 8, 1948, and one of Nov. 4, 1949.

All the commodities heretofore enumerated shall be regarded as war contraband even when passing Egypt's territory or territorial waters in transit.¹⁵

These aggravations, in scope and geographical extent, of the restrictive measures were commented upon by the members of the Security Council and the Government of Israel, and they were not denied by the Government of Egypt.¹⁶

The legal basis of the Egyptian restrictions was discussed "from a purely academic point of view" by the Prize Court of Alexandria in the case of *The Fjeld*. Claimant argued that the seizure was null and void, as the procedure for inspection was carried out "at a time when no state of war existed"; that prior to May 15, 1948, no state of war could have existed between "the Zionist armed bands and the Arabs" and none could exist after that date because Egypt had not recognized the "Zionist State."¹⁷ The Prize Court held that "the Palestinian conflict had begun some time before 15 May 1948 and that the Palestinian Arabs and States of the Arab League actively participated therein," and that "Egypt, in her capacity of member of the Arab League and ally of members of the League, found herself in a state of war with the Zionists, before 15 May 1948."¹⁸ Regarding the claimant's second argument the Prize Court held that it was contradicted by the facts:

Not only has the State of Israel been admitted to the United Nations but also on 15 May, the United States of America and Russia recognized the new State. Such recognition was unqualified and conferred upon Israel the capacity to proceed according to the laws of war, to seizures and to taking in prize so far as her enemies were concerned. The exercise of such rights by Israel against Egypt and the group of Arab States gives, no doubt, a corresponding right to Egypt to exercise the same rights against Israel. The non-recognition by Egypt of Israel as a State cannot prevent Israel from being regarded as a belligerent. Nothing in international law requires that the status of belligerency should be expressly proclaimed; such a status can result from circumstances. The Egyptian Government, by creating a Prize Court governed by the principles of international law, and by applying the rules of war in so far as concerns the treatment of prisoners and wounded and so far as concerns the conduct of hostilities, has clearly shown its desire to follow the rules laid down by international law in the Palestinian conflict.

It now remains to decide the consequences of the conflict in so far as neutrals are concerned. It is established that the Palestinian conflict constitutes, from the legal point of view, a true war with international aspects. This imposes upon neutrals the duties resulting from neutrality and requires them to submit to the rights of the belligerents, whether or not such neutrals have officially proclaimed their neutrality,

¹⁵ Security Council, Official Records, 9th Year, Supp. Jan.-March, 1954, p. 9.

¹⁶ See remarks by the representatives of New Zealand, Official Records, 662nd Meeting, March 23, 1954, p. 3, par. 10; Brazil, *ibid.*, 664th Meeting, March 29, 1954, p. 5, par. 17; Israel, *ibid.*, 659th Meeting, Feb. 15, 1954, p. 17, par. 94; and Egypt, *ibid.*, 661st Meeting, March 12, 1954, p. 6, par. 28.

¹⁷ 1950 Int. Law Rep. 345 at 347.

¹⁸ *Ibid.* 348.

for neutrality is only one of the consequences of a state of war, and subjects neutrals, by reason only of their knowledge of such a state, to the action of the belligerents.¹⁹

It is important to note that the Prize Court took no notice of the General Armistice Agreement between Egypt and Israel. The Court presumably assumed, as the Egyptian Government did, that the Armistice had no effect on continued validity of the legislation concerning visit, search and seizure. If the Prize Court had taken the opposite view, that the conclusion of the Armistice Agreement put an end to the legislation of 1948, the re-enactment of virtually the identical measures by the Decree of February 6, 1950, after the conclusion of the Armistice Agreement, left the Court no choice. On this point the Court held:

The existence of a state of war or of neutrality in so far as non-belligerents are concerned cannot be discussed by the Prize Court, for it is the duty of the Court to apply the law without examining its legality.²⁰

It may well be that the Court, under the Egyptian system of law was precluded from discussing the "existence of a state of war," both before and after the Armistice Agreement entered into force. The existence or non-existence of a state of war after the entry into force of the Agreement has been and continues to be the first point in the debates before the international forum.

It will be noted that the Egyptian decrees referred to do not deal especially with "enemy" ships. This is perhaps unnecessary as customary international law and the applicable Hague Conventions provide the necessary legal basis in time of war. The question whether and to what extent the Constantinople Convention of October 29, 1888, respecting the Free Navigation of the Suez Maritime Canal derogates from the usual rules regarding visit, search and seizure, has been considered by the Prize Court of Alexandria and debated even more extensively before the U.N. Security Council. The views expressed in the latter forum will be discussed below. In *The Flying Trader*, the Prize Court of Alexandria, after reviewing Articles 1, 4, 5, 7, 8, 9, 10, and 11 of the Convention, concluded:

It falls to this Court to interpret the expression "the defence of Egypt and the maintenance of public order,"²¹ a situation which involves the non-application of Article 4 of the Convention.

The Court has already ruled that Egypt was truly a belligerent State possessing the right of capture *jure belli*. It follows that Egypt has in this connexion the right to take any measures necessary for its defence. The exercise of this right in no way runs counter to the provisions of Articles 4, 5, and 7, for the prohibitions contained in those articles cannot interfere with the natural right of a State to preserve its own existence, a right which cannot be the subject even of express renunciation. Egypt is the sole judge of the existence of a state of danger menacing her existence and rendering necessary cer-

¹⁹ *The Fjeld*, Prize Court of Alexandria, Nov. 4, 1950. *Ibid.* 345 at 348 ff.

²⁰ *The Fjeld*, *loc. cit.* 347.

²¹ In Art. 10 of the Convention.

tain acts referred to in Article 4.²² All that the Convention requires, in the event of the carrying out of particular measures, is notification to the Powers signatory to the Declaration of London of 17 March 1885. Every armed conflict to which Egypt is a party, and especially a conflict with its neighbors, raises inevitably the question of the defence of its own territory, whatever the origin of the hostilities may be. The entire territory, land or sea, becomes, in the eyes of international law, a theatre of war authorizing the enemy to commit such acts of war therein as it may judge expedient.²³ There flows from this the necessity of repelling aggression, whether by repulsing enemy attacks, or in preventing such attacks from taking place, which includes interrupting the means of reinforcing such attacks.

The provisions of Article 11 of the Convention, which states that measures taken by Egypt and Turkey in the exceptional cases contemplated by Articles 9 and 10 must not interfere with the free use of the Canal, cannot be construed as a restriction upon the rights of Egypt. The signatories of the Convention intended by this Article to confirm what is said in Article 1²⁴ about free passage through the Canal in time of war and peace; but reasonable and necessary measures taken by Egypt do not interfere with such passage.²⁵

Here again is a failure to take into account the existence of a complete armistice between Egypt and Israel, by land, sea and air.²⁶ Whatever may have been the rights of the parties during the stage of active hostilities, the commission of hostile or warlike acts has been rendered illegal by the Armistice.²⁷ If the commission of such acts is prohibited as between the parties to the Armistice, it follows *a fortiori* that they are prohibited

²² In order to avoid a possible misunderstanding of the Court's argument, reference must be had to Art. 4 of the Constantinople Convention:

"The Maritime Canal remaining open in time of war as a free passage, even to ships of war of the belligerents, under the terms of Article I of the present Treaty, the High Contracting Parties agree that no right of war, act of hostility or act having for its purpose to interfere with the free navigation of the Canal, shall be committed in the Canal and its ports of access, or within a radius of 3 nautical miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers." The Suez Canal Problem, *op. cit.* 17; 3 A.J.I.L. Supp. 124 (1909). It will be seen that contrary to a possible implication in the Court's language, Art. 4, far from authorizing Egypt to take any action in the Canal, expressly prohibits the exercise of any right of war.

²³ The Court referred here to 2 Oppenheim, International Law 187 (1944 ed.).

²⁴ Art. 1 of the Convention:

"The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag."

"The Canal shall never be subject to the exercise of the right of blockade." *Op. cit.* 17; 3 A.J.I.L. Supp. 123 (1909).

²⁵ 1950 Int. Law Rep. at 446 ff.

²⁶ Art. II, par. 1, of the Egyptian-Israeli General Armistice Agreement, Rhodes, Feb. 24, 1949. U.N. Doc. S/1264/Rev. 1; Security Council, Official Records, 4th Year, Spec. Supp. No. 3, p. 2.

²⁷ The following articles of the General Armistice Agreement are relevant in this context: Art. I, par. 2: "No aggressive action by the armed forces—land, sea, or air—of either Party shall be undertaken, planned, or threatened against the people or the armed forces of the other"; Art. II, par. 2: "No element of the land, sea or air military or para-military forces of either Party, including non-regular forces, shall commit any warlike or hostile act against the military or para-military forces of the other Party, or against civilians in territory under the control of that Party." *Ibid.*

also in relation to third states, strangers to the conflict. The legality of Egypt's restrictions against third states has been open to question even during the hostilities, as evidenced by the protests addressed to Egypt.²⁹ They have become even more problematical after the end of hostilities.³⁰ On the strength of the Court's reasoning, Israel would have the right to commit acts of war—by land, sea and air—against Egypt if the Armistice Agreement did not exist. If such acts are deemed prohibited—as they rightly are—to one party, by parity of reasoning they are also prohibited to the other.

The Court's contention that Egypt "is the sole judge" is untenable. Only the Convention of Constantinople could have conferred such an exclusive right (auto-decision), that is, the right to interpret the Convention with binding force for the other parties to it and the world at large. In the absence of such an exclusive competence, Egypt has merely the right of auto-interpretation.³¹ That this was the intent of the authors of the Convention clearly appears from its Article 8, paragraph 1:

The Agents in Egypt of the Signatory Powers of the present Treaty shall be charged to see that it is carried out. . . . In any case, they shall meet once a year to take note of the due execution of the Treaty.

The acts of the Egyptian Government have thus been placed under the supervision of the Contracting Parties.

It follows that the exception in favor of Egypt provided in Article 10 of the Convention does not escape the general supervision by the other Contracting Powers. Moreover, as the Court recognizes, the measures which Egypt "might find it necessary to take to assure by the use of force the defense of Egypt and the maintenance of public order" under Article 10 of the Convention, are restricted by the requirement of Article 11, namely, such measures "shall not interfere with the free use of the Canal." The Court's statement that "reasonable and necessary measures taken by Egypt do not interfere with such passage" is for this reason not altogether in harmony with the Convention. Whether measures taken by Egypt do or do not interfere with "the free use of the Canal" is a question of fact. Certainly Egypt is authorized to take "reasonable and necessary" measures but these measures must not interfere with the "free use" of the Canal. It cannot be assumed, as the Prize Court apparently does, that any measures which Egypt regards as "reasonable and necessary" will not interfere with "free use." The

²⁹ Mr. Fawzi (Egypt) stated in the Security Council: "Most of the protests were lodged with the Egyptian Government even while the hostilities in Palestine were still taking place." Official Records, 553rd Meeting, Aug. 16, 1951, p. 24, par. 101.

³⁰ Referring to the Egyptian contention that a dispute existed between the protesting Powers and Egypt, Sir Gladwyn Jebb (United Kingdom) said: "If there were a dispute within the meaning of the Charter between one of the five delegations mentioned and Egypt, the Armistice Agreement and the whole question of Palestine would be quite irrelevant." Official Records, 555th Meeting, Aug. 27, 1951, p. 3, par. 10.

³¹ Cf. Leo Gross, "States as Organs of International Law and the Problem of Auto-Interpretation," in George A. Lipsky (ed.), *Law and Politics in the World Community*, pp. 79-89 (1953).

very well may so interfere and in the case under consideration they have been found to do so by a large number of states.

III. EFFECTIVENESS OF EGYPT'S RESTRICTIONS AND PROTESTS AGAINST THEM

Members of the Security Council have on four different occasions discussed the Egyptian restrictions from the legal, political and practical points of view.⁸¹ Members of the United Nations from the very beginning of the restrictions have also protested directly to the Government of Egypt against them. Speaking in the Security Council the representative of Egypt stated:

Up to today, the Netherlands has protested to the Egyptian Government no less than three times; Turkey, at least once; the United Kingdom, at least ten times; the United States, twelve times; and France, twenty-two times. Most of the protests were lodged with the Egyptian Government even while the hostilities in Palestine were still in progress.⁸²

Israel's complaints, chiefly juridical in nature, obviously also stressed the adverse effect on its economy. In 1951 the representative of Israel stated that "vessels found to have called at any port in Israel are placed on a black list" and that the "threat of forcible interference acts as a deterrent to the normal trade which would otherwise have passed through the Suez Canal to or from Israel."⁸³ The blacklist, according to the Government of Israel, contains 104 ships of "British, United States, Swedish, Greek, Norwegian, Dutch, Danish, Panamanian, Liberian, Swiss, Costa Rican and Italian nationality."⁸⁴ The effect of blacklisting is that

⁸¹ The first debate took place in October–November, 1950, in connection with the Israeli complaint: "Violations by Egypt of the Egyptian–Israeli General Armistice Agreement through the maintenance for seventeen months of blockade practices inconsistent with the letter and spirit of the armistice agreement," U.N. Doc. S/1794, Sept. 16, 1950. The second debate took place at several meetings held between July 26, 1951, and Sept. 1, 1951, following the Israeli complaint: "Restrictions imposed by Egypt on the Passage of Ships through the Suez Canal," U.N. Doc. S/2241, July 11, 1951, Official Records, 6th Year, Supp. July–Sept., 1951, p. 9. The third debate occurred at several meetings between Feb. 5 and March 29, 1954, regarding the Israeli complaint: "Enforcement by Egypt of Restrictions on the Passage of Ships trading with Israel through the Suez Canal," U.N. Doc. S/3168, Jan. 28, 1954, Official Records, 9th Year, Supp. Jan.–March, 1954, p. 1. The final debate was concerned with the complaint by Israel arising from "the illegal arrest and detention of the Israel vessel, the *Bat Galim*, on 28 September 1954" and was spread over meetings held Nov. 3, 1954–Jan. 13, 1955, U.N. Doc. S/3300, Official Records, 9th Year, Supp. Oct.–Dec., 1954, pp. 1 ff.

⁸² Official Records, 553rd Meeting, Aug. 16, 1951, p. 23, par. 98. Similarly, the representative of the United Kingdom said: "During the past two years a number of maritime countries have made almost continuous representations to the Egyptian Government through the diplomatic channels, but all these have been of no avail." Official Records, 552nd Meeting, Aug. 16, 1951, p. 4, par. 12.

⁸³ Official Records, 549th Meeting, July 26, 1951, p. 3.

⁸⁴ Letter dated Oct. 13, 1956, from the representative of Israel to the President of the Security Council, U.N. Doc. S/3673, p. 6.

cargo carried on these ships shall "be deemed intended for the enemy" and subject to confiscation and seizure, while the ships themselves would be denied the essential facilities necessary for passage through the Suez Canal. The existence of the Blacklist is, therefore, the most stringent of the deterrents whereby Egypt has prevented trading with Israel through an international waterway.³⁵

In the view of Israel, "some 90 per cent of the trade which would have normally flowed through the Canal to and from Israel in the past eight years has been effectively obstructed."³⁶ Several ships were visited and searched, and "Egypt has confiscated and held goods of the value of \$5,000,000 seized from ships exercising innocent passage in the Suez Canal."³⁷

The representative of Egypt, while admitting that "some maritime Powers are, to our regret affected, although slightly, by the exercise by Egypt of its right of visit and inspection," and that "it is natural for them to want to complain," argued that "it is natural for us to want to survive."³⁸ Generally, the position taken by Egypt was to stress the small number of ships affected, the lenient manner in which she exercised what she claimed as her rights, and to hold out the prospect of relaxation of the measures in force. Thus the representative of Egypt spoke of "the relatively microscopic action of Egypt,"³⁹ and offered to show that "Egypt does little more than delay only a few ships for only a few minutes."⁴⁰ During the period

15 May 1948 to 24 February 1949, out of 8,009 merchantmen which arrived at Port Said, 548 ships were visited and only 71 ships were unloaded of contraband of war. During the same period, 282 ships reached Suez, and only two ships were visited and none was even partly unloaded. In the following three months, 2,139 ships arrived at Port Said, 195 of them were visited and only 25 were partly unloaded. During the same period 1043 ships reached Suez, nine of them were visited and none at all unloaded.⁴¹

In the course of the 1954 debate, the representative of Egypt declared that "since the Security Council adopted its resolution of 1 September 1951, no ship or cargo has been confiscated by Egypt" and that since then "only 55 suspected ships have been subjected to the inspection procedure

³⁵ *Ibid.* The blacklist includes 75 tankers. *Ibid.* 10. Blacklisting of ships is provided for in Art. 11 of the Royal Decree of 1950: Cargo shall be "deemed intended for the enemy whenever . . . (2) It is being shipped indirectly to such persons or institutions (on Palestinian territory occupied by the enemy). This shall be presumed in any of the following circumstances: . . . (g) If the consignor or consignee is listed on the blacklist kept for that purpose as a carrier of contraband for the Zionists."

³⁶ *Ibid.* 7.

³⁷ *Ibid.* 9. For a list of some of these ships, cf. *ibid.* 7-9. The representative of Israel said in the Security Council that "about 95 per cent of Israel's normal trade in products other than oil has been throttled through these restrictions, and, in the case of oil, 100 per cent of that aspect of Israel's import trade has been completely strangled." Official Records, 661st Meeting, March 12, 1954, p. 31, par. 152.

³⁸ Official Records, 549th Meeting, July 26, 1951, p. 21, par. 79.

³⁹ *Ibid.*, 553rd Meeting, Aug. 16, 1951, p. 15, par. 62.

⁴⁰ *Ibid.*, 550th Meeting, Aug. 1, 1951, p. 3, par. 11.

⁴¹ *Ibid.*, 549th Meeting, July 26, 1951, p. 20, par. 75.

out of 32,047 ships passing through the Suez Canal."⁴² After quoting figures showing an increase in the tonnage of goods passing through the Canal he said: "It is clear, therefore, that the measures of visit and search taken by Egypt have not in the least restricted the free use of the Canal."⁴³

Relaxation of the restrictions was referred to several times by the representative of Egypt.⁴⁴ After the Security Council failed to adopt the New Zealand draft resolution owing to the Soviet Union's negative vote, he declared that "now Egypt . . . will of its own free will move towards tolerance."⁴⁵ The representative of Lebanon stressed that "this positive note which the representative of Egypt has afforded us . . . is something which we can all welcome and stress and end upon as a happy note."⁴⁶ As the seizure of the Israeli ship *Bat Galim* by Egypt on September 28, 1954, was to show, Egypt's spontaneous offer of "tolerance" was either shortlived or fell far short of the Security Council resolution of September 1, 1951.

The statistics adduced by Egypt, far from proving the absence of any serious interference with non-Israeli shipping through the Suez Canal, were regarded by the representative of Israel and eight members of the Security Council as proof of the opposite, namely, the substantial effectiveness of the restrictions in deterring trade with Israel.

IV. NATURE OF THE RESTRICTIONS

The legal nature of the Egyptian restrictions was discussed in several instances in the Security Council. Israel characterized these measures as blockade or "blockade practices" on several occasions.⁴⁷ This point is of some relevance in view of Article 1, paragraph 2, of the Constantinople Convention of 1888 which provides categorically: "The Canal shall never be subject to the exercise of the right of blockade." The Egyptian Government was accordingly at pains to show that the practices in question were technically and juridically not a blockade. Thus its representative declared in the Security Council:

Egypt has never decreed or applied a blockade of the Suez Canal. Its action is confined to the boarding and inspection by customs employees of a very small number of suspected merchant vessels.⁴⁸

⁴² Official Records, 661st Meeting, March 12, 1954, p. 17, paras. 88-89.

⁴³ *Ibid.*, p. 18, par. 91.

⁴⁴ *Ibid.*, 659th Meeting, Feb. 15, 1954, p. 24, par. 130; 661st Meeting, March 12, 1954, p. 20, par. 105; 662nd Meeting, March 23, 1954, p. 12, par. 43.

⁴⁵ *Ibid.*, 664th Meeting, March 29, 1954, p. 23, par. 157.

⁴⁶ *Ibid.*, p. 24, par. 164.

⁴⁷ The Israeli complaint of Sept. 16, 1950 (U.N. Doc. S/1794), referred to "blockade practices." See also statements by the representative of Israel at 433rd Meeting, Aug. 4, 1949, p. 16; 517th Meeting, Oct. 30, 1950, p. 10 f.; 522nd Meeting, Nov. 13, 1950, p. 23; 549th Meeting, July 26, 1951, p. 13; 658th Meeting, Feb. 5, 1954, p. 12, par. 49; 659th Meeting, Feb. 15, 1954, p. 14, paras. 80, 88, 89. See also statement by the representative of the United Kingdom in which he referred to the "blockade practices in the Suez Canal," *ibid.*, 522nd Meeting, Nov. 13, 1950, p. 17.

⁴⁸ *Ibid.*, 658th Meeting, Feb. 5, 1954, p. 31, par. 163. See also 659th Meeting, Feb. 15, 1954, p. 24, paras. 127, 128; 661st Meeting, March 12, 1954, p. 6, par. 27 f., p. 15, par. 77.

This statement fails to mention the right of seizure or confiscation, which is also claimed by Egypt as a consequence of belligerency, and that the action of customs officers may be supported by force.⁴⁹

It can readily be conceded that the right of visit, search and seizure which Egypt admittedly enforces in the Suez Canal is not identical with the right of blockade as the term is normally understood in the law of naval war. However, this is true only insofar as ships of nations other than Israel are concerned; for Israeli ships have been barred absolutely from entering the Canal, and to that extent and in that sense it is not improper to say that Egypt has subjected the Canal to a blockade against Israeli ships within the meaning of the second paragraph of Article 1 of the Constantinople Convention. The normal meaning of blockade would, in any event, not make much sense in connection with that clause.⁵⁰

Israel attempted only once to send a merchant vessel, the *Bat Galim*, flying her flag, through the Canal. The ship, described by the Egyptian Government as an "armed Israel vessel," during the night of September 27-28, 1954, "entered the Gulf of Suez through Egyptian territorial waters and advanced through the Gulf on its way to Suez."⁵¹ It was further alleged that "the crew attacked two Egyptian fishing boats by automatic fire . . . sinking one of them, thus causing the death of two Egyptian fishermen," and that "this hostile act committed by armed Israelis inside Egyptian territorial waters constitutes a flagrant violation of the General Armistice Agreement."⁵² The Commission investigated the allegations and by a majority vote—the Israeli delegate and the Chairman voting in favor—adopted the Israeli draft resolution and found "the Egyptian complaint regarding the *Bat Galim* case to be unfounded and that no provision of the General Armistice Agreement has been violated by Israel."⁵³ After the vote the Chairman stated:

Arts. 1 and 3 of the Royal Decree of Feb. 6, 1950, see *supra*, p. 533. Another representative of Egypt stressed strongly the right of confiscation, saying: "To judge whether Egypt is entitled to practise the right of visit, search and confiscation of contraband, reference must be made to the rules of international law. A state of war gives the belligerents certain rights. Foremost amongst these is the incontestable right of visit and search of ships in territorial waters, in ports, in mid-ocean, and in enemy waters, with a view to the confiscation of what is legally considered war contraband." Official Records, 659th Meeting, Feb. 15, 1954, p. 3, par. 9.

⁴⁹ The Egyptian representative quoted C. John Colombos, *The International Law of the Sea*, p. 539: "Blockade is the interception by sea of the approaches to the coasts or ports of an enemy with the purpose of cutting off all his overseas communications. Its object is not only to stop the importation of supplies but to prevent export as well." Official Records, 661st Meeting, March 12, 1954, p. 6, par. 29.

⁵¹ Report dated Nov. 25, 1954, by the Chief of Staff of the United Nations Truce Supervision Organization in Palestine to the Secretary General concerning the *Bat Galim* incident, U. N. Doc. S/3323; Official Records, 9th Year, Supp. Oct.-Dec., 1954, p. 30 at p. 32, par. 8.

⁵² *Ibid.* at 30, par. 2.

⁵³ *Ibid.* at 40, 41, pars. 34, 40. The Egyptian delegate appealed against this decision to the Special Committee provided for in the Armistice Agreement. This committee decided on Nov. 25, 1954, as follows: "The Special Committee finds that the words in the resolution, 'the Egyptian complaint regarding the *Bat Galim* case to be unfounded and' should be omitted, for the following reasons: The Mixed Armistice Commission should not adopt resolutions defining a complaint as 'unfounded,' as this may appear as

I have voted for the Israel draft resolution because conclusive evidence has not been produced that the *Bat Galim* attacked the Egyptian fishermen in the Gulf of Suez. I shall call on both parties to come quickly to an agreement for the release of the *Bat Galim* and its crew.⁵⁴

After its judicial authorities "set aside, owing to insufficient evidence," the various charges against the crew of murder and unlawful carrying of weapons, the Egyptian Government declared on December 4, 1954, that it was prepared to release crew and cargo, and on December 23, 1954, it also declared that it was prepared to release the ship.⁵⁵ It appears that the crew was released but, according to the Israeli Government, Egypt violated her undertakings regarding the cargo and the ship.⁵⁶

This incident appears to show that the Egyptian Government's practices regarding Israeli ships are more akin to the concept and purpose—interception of enemy ships—of a blockade than to visit and search and seizure of war contraband. If Egypt were concerned merely with visit and search, there was no reason for not allowing the *Bat Galim* to proceed on its voyage through the Canal after Egypt had satisfied itself that the ship was unarmed and that its cargo was not subject to seizure.⁵⁷ In view of these facts, admitted by Egypt, there remains the Israeli flag as the sole reason for not permitting the ship to proceed through the Canal. This has indeed been freely conceded by Egypt and defended in terms of the state of war or belligerency which she claims to exist.⁵⁸ In addition to the state of war as a ground for barring and intercepting Israeli ships, Egypt also claimed that the security of the Canal required the exclusion of such ships, as they might commit acts of sabotage within the approaches to the Canal or *within* the Canal itself.⁵⁹ It follows then that as long

restricting the right of either side to submit any complaint it may deem necessary; furthermore, it is unnecessary to describe a complaint in such terms after the non-adoption of the complaining party's resolution. This decision is not intended as a judgment on the facts of this particular case, as to which the Special Committee has no competence, nor is it intended as a reversal of the findings of the Mixed Armistice Commission in the resolutions as to the facts." *Ibid.* at 42 f., par. 48.

⁵⁴ *Ibid.* at 41, par. 41.

⁵⁵ See U.N. Docs. S/3326 and S/3335, *ibid.* at 44, 45.

⁵⁶ See U.N. Doc. S/3673, p. 8: "The Egyptian Government appropriated the cargo to itself, and has now commissioned the confiscated ship to the Egyptian Navy."

⁵⁷ Statement by Egyptian representative at 686th Meeting, Dec. 7, 1954, p. 16, par. 79.

⁵⁸ Said the representative of Egypt: "... in the state of belligerency which in our opinion still exists between Egypt and Israel, how can we allow Israel vessels to pass through the Suez Canal without interference, as the Israel representative demands?" *Ibid.* 24, par. 132.

⁵⁹ Said the representative of Egypt: "What guarantee have we that an Israel merchant vessel passing through the Canal will not be tempted to scuttle itself and thus obstruct the Canal for a considerable period, causing material losses and gravely damaging the interests of maritime Powers in general? Who can say that Israel vessels passing through the Canal will not be tempted even to lay mines in Egyptian territorial waters, either before reaching the Suez Canal or in the Canal itself? Lastly, who can say that Israel nationals on such a vessel will not try to find a way of landing in Egypt in order to damage the Canal or commit acts of sabotage in Egyptian territory?" *Ibid.*, par. 133.

as Egypt maintains the state of war with Israel, rights of belligerency are claimed which are in the range of economic warfare. As far as the ships of what Egypt calls "neutral" states are concerned, they are subjected to visit, search and seizure, whereas the ships of Israel are subjected to complete exclusion and interception in fact. Therefore, as far as Israeli ships are concerned, the effect of these measures appears indistinguishable from that of a blockade prohibited generally by the Constantinople Convention. The fundamental thesis of Egypt is the continuation of the state of war and exercise of belligerent rights in the Suez Canal as incidental to the former. It is therefore necessary to examine the validity of this thesis.

V. CONTINUATION OF STATE OF WAR BETWEEN EGYPT AND ISRAEL AS LEGAL JUSTIFICATION FOR RESTRICTIVE PRACTICES

There has never been a deviation from the Egyptian thesis that a state of war continues to prevail between Egypt and Israel, and this thesis has been the chief target of the Government of Israel and of the Security Council, particularly in its resolution of September 1, 1951.

The General Armistice Agreement of February 24, 1949, with Israel "which put an end to hostilities and which was accepted as an indispensable step towards the liquidation of the armed conflict," in the opinion of the Egyptian Government, "did not put an end to the conflict and contains no provision concerning the right of visit and inspection."⁶⁰ Moreover, "the principles of international law uphold this view,"⁶¹ and the practice, "which is designed to ensure the defence of Egypt and the maintenance of public order there, cannot be construed as an infringement of the provisions of the Convention signed in 1888 concerning the Suez Canal."⁶²

As regards Israeli ships in particular, Egypt contended that the Security Council resolution of September 1, 1951, which in any event it did not carry out, was inapplicable, as it was concerned with "the passage of neutral merchant vessels through the Canal for the purpose of trading with Israel, and not the passage of Israel vessels."⁶³

1. *Compatibility of the Restrictive Practices with General International Law*

It may be conceded that according to general international law an armistice does not put an end to a state of war. It may also be conceded, although this was contested by Israel,⁶⁴ that the *de facto* hostilities which developed as a result of the military intervention of Egypt and other Arab States⁶⁵ resulted in a *de facto* state of war. However, what may be the ef-

⁶⁰ *Ibid.* 20, par. 100, and 21, par. 113.

⁶¹ *Ibid.*, pars. 101, 103, 113.

⁶² *Ibid.* 20, par. 104, and 21, pars. 105-111.

⁶³ *Ibid.* 23, par. 123. See also pars. 124-131.

⁶⁴ Security Council, Official Records, 549th Meeting, July 26, 1951, p. 10, pars. 10-36.

⁶⁵ This intervention has been regarded as aggression. Said the representative of the United States in the Security Council: "Probably the most important and best evidence we have on that subject is contained in the admissions of the countries whose five

fect of the Charter on the traditional doctrine of war and belligerent rights, particularly when some or all of the belligerents are Members of the United Nations, is a moot question. State practice has not always been uniform, and in some cases the cessation of hostilities has ended the state of war itself.⁶⁶ The general armistice is

a living, dynamic war convention. . . . The elaborate armistice agreements of recent years have, in effect, rendered the preliminaries of peace obsolete. It is not inconceivable that the formal treaty of peace will suffer the same fate and that wars will one day end at the armistice table.⁶⁷

It is, therefore, far more important to concern ourselves with the intended effect and scope of particular armistice agreements ending particular hostilities, than with the general question of the effect of an armistice on the existence of a state of war. It has been suggested that the question whether a particular armistice agreement has the effect of terminating the war is one of "construction of the particular armistice agreement concerned."⁶⁸ It may well be that an armistice agreement, even without terminating the state of war in the legal sense, puts an end to certain hostile acts such as blockade or visit, search and seizure.

2. *Compatibility of the Restrictive Practices with the General Armistice Agreement between Egypt and Israel.*

The Egyptian-Israeli General Armistice Agreement was signed at Rhodes on February 24, 1949, and entered into force on that date.⁶⁹ The Agreement was concluded pursuant to the Security Council resolution of November 16, 1948, calling upon the parties "as a further provisional measure under Article 40 of the Charter of the United Nations, and in order to facilitate the transition from the present truce to permanent peace in Palestine, to negotiate an Armistice."⁷⁰ The Agreement, pertinent provisions of which have already been quoted,⁷¹ recognizes "the right of each party to its security and freedom from fear of attack by the armed forces of the other."⁷² The Agreement prohibits all "warlike or hostile" acts against military, para-military forces and civilians, but does not specifically refer to blockades, or visit, search and seizure of vessels. Whether in the absence of a specific prohibition such acts are permitted, as Egypt argues,

armies have invaded Palestine that they are carrying on a war. Their statements are the best evidence we have of the international character of this aggression; it is a word which is not included in the text but which has been mentioned in the statements of these aggressors." Official Records, 3rd Year, No. 72, p. 41. The former Secretary General of the United Nations said: "The invasion of Palestine by the Arab States was the first armed aggression which the world had seen since the end of the war." Trygve Lie, *In the Cause of Peace* 174 (1954); cf. also 178 ff.

⁶⁶ Julius Stone, *Legal Controls of International Conflict* 639 (1954).

⁶⁷ Colonel Howard S. Levie, "The Nature and Scope of the Armistice Agreement," 50 A.J.I.L. 880-906 at 906 (1956). This day, however, in the view of the author, has not yet come. *Ibid.* 884.

⁶⁸ Stone, *op. cit.* 641.

⁶⁹ Art. 12, par. 1, U.N. Doc. S/1264/Rev. 1; Official Records, 4th Year, Spec. Supp. No. 3, p. 8.

⁷⁰ Preamble, *ibid.*, p. 1.

⁷¹ See *supra*, p. 536.

⁷² Art. 1, par. 3.

are to be deemed prohibited by inclusion in the acts specifically mentioned, which will be discussed presently. It is useful to recall, however, that the Armistice Agreement with Germany of November 11, 1918, specifically continued "the existing blockade conditions."⁷³ The Armistice Agreement in Korea of July 27, 1953, concluded "with the objective of establishing an armistice which will insure a complete cessation of hostilities and of all acts of armed force in Korea," provides in Article 2 A, paragraph 15, that the naval forces of the opposing parties "shall not engage in blockade of any kind of Korea." The United Nations Command accordingly gave orders to its naval forces "to cease hostilities and blockade operations."⁷⁵ As the Egyptian-Israeli Armistice Agreement was concluded under orders from the Security Council, some light might be shed on its intended meaning by referring to the Council's debates and resolutions.

(a) *The Armistice Agreement before the Security Council: Interpretation and Construction*

The United Nations Acting Mediator on Palestine, Dr. Ralph J. Bunche who actively participated in the armistice negotiations, stated in the Security Council on August 4, 1949:

The Armistice Agreements are not the final peace settlement, but the only possible interpretation of their very specific provisions is that they signal the end of the military phase of the Palestine situation . . . The entire heritage of restrictions which developed out of the undeclared war should be done away with. There should be normal access . . . there should be free movement for legitimate shipping, and no vestiges of the wartime blockade should be allowed to remain, as they are inconsistent with both the letter and the spirit of the Armistice Agreements.⁷⁶

The representatives of Israel, the United Kingdom and the United States concurred in this interpretation. The latter also stated that "the Armistice Agreements contain provisions which make them in fact non-aggression pacts." And the representative of China said: "We rejoice in the restoration of normal relations" between the parties to the Agreements.⁷⁷ It may be added here that in the course of the recent crisis in the Middle East, the Secretary General of the United Nations expressed the view, echoing the above statement by the United States representative, that Article 1 "assimilates the Armistice Agreement to a non-aggression pact, providing for mutual and full abstention from belligerent acts."⁷⁸

The Security Council, by nine votes in favor, with two abstentions (Ukrainian S.S.R., U.S.S.R.), adopted a resolution on August 11, 1949, in

⁷³ Sir Frederick Maurice, *The Armistices of 1918*, p. 98 (1943).

⁷⁴ U.N. Doc. S/3079, Aug. 7, 1953; reprinted in 47 A.J.I.L. Supp. 186 (1953). It has been said that this "is probably one of the most complete naval provisions ever included in an armistice agreement." *Levie, loc. cit.* 906.

⁷⁵ U.N. Doc. S/3185; Official Records, 9th Year, Supp. Jan.-March, 1954, p. 40 at 42.

⁷⁶ Official Records, 4th Year, No. 36, p. 6. See also Shabtai Rosenne, *Israel's Armistice Agreement with the Arab States* 45 (1951).

⁷⁷ Official Records, 4th Year, No. 36, pp. 16, 19, 25, 27, 33.

⁷⁸ U.N. Doc. A/3512, Jan. 24, 1957, p. 5, par. 15.

which, making its own the interpretation submitted by the Acting Mediator, it

Reaffirms, pending the final peace settlement, the order contained in its resolution of 15 July 1948 to the Governments and authorities concerned, pursuant to Article 40 of the Charter of the United Nations, to observe an unconditional cease-fire and, bearing in mind that the several armistice agreements include firm pledges against any further acts of hostility between the parties and also provide for their supervision by the parties themselves, relies upon the parties to ensure the continued application and observance of these agreements.⁷⁹

It follows then that, although the Agreement itself is silent on the point, it has been interpreted authoritatively as prohibiting belligerent acts of visit, search and seizure. This construction is all the more indicated as the statement by the Acting Mediator was made and the resolution of the Security Council was adopted after the matter of restrictions had first been raised by Israel before the Mixed Armistice Commission. No dissent was voiced from this interpretation in the Security Council. No claim was made regarding the existence or continued existence of a state of war.

(b) *The Armistice Agreement before the Mixed Armistice Commission*

The question of the compatibility of the Egyptian restrictive practices with the General Armistice Agreement was first considered by the Mixed Armistice Commission in June, 1949, at the request of Israel in connection with a particular incident. At that time the Commission decided that "the blockade of the Suez Canal was not a subject that could be discussed in the Mixed Armistice Commission."⁸⁰ In August, 1949, Israel submitted a second complaint of a specific character and the Commission decided:

The Mixed Armistice Commission did have the right to demand that the Egyptian Government should not interfere with the passage of goods to Israel through the Suez Canal.⁸¹

Egypt appealed to the Special Committee. The Security Council, in consequence of the Israeli complaint before it, on November 17, 1950, adopted a resolution reiterating the substance of its resolution of August 11, 1949, and, "bearing in mind that the several armistice agreements include firm pledges against any further act of hostility between the parties," reminded Egypt and Israel of their obligations under the Charter and requested the Chief of Staff to report "on the compliance given to this resolution" and decisions of the Special Committee.⁸²

The Chief of Staff, General Riley, reported to the Security Council on June 12, 1951, the decision of the Special Committee "on the question as to whether or not the Mixed Armistice Commission has the right to demand from the Egyptian Government not to interfere with the passing

⁷⁹ U.N. Doc. S/1367; Official Records, 4th Year, No. 37, p. 2 f., No. 38, p. 13.

⁸⁰ General W. E. Riley, Chief of Staff, Truce Supervision Organization, in Security Council, Official Records, 516th Meeting, Oct. 30, 1950, p. 22.

⁸¹ *Ibid.*, and Official Records, 518th Meeting, Nov. 6, 1950, p. 20.

⁸² U.N. Doc. S/1907; Official Records, 524th Meeting, Nov. 17, 1950, p. 15.

of goods to Israel through the Suez Canal." In view of the significance of this Report on the compatibility of Egyptian restrictions with the Armistice Agreement and the conflicting interpretations placed upon it by the Security Council, Egypt and Israel, its operative part is reproduced *in extenso*:

In explanation of his vote, which was contrary to the stand taken by Israel, the Chief of Staff made the following statement:

It is quite clear to me that action taken by Egyptian authorities in interfering with passage of goods destined for Israel through the Suez Canal must be considered an aggressive action. However, due to the limitation imposed by the text itself on the words "aggressive action," this action is not necessarily against article 1, paragraph 2 of the General Armistice Agreement which states in part "No aggressive action by armed forces—land, sea, or air—of either party shall be undertaken, planned, or threatened against the people or the armed forces of the other."

Similarly, I must of necessity consider that interference with the passage of goods destined for Israel through the Suez Canal is a hostile act, but not necessarily against the General Armistice Agreement, because of the limitations imposed on the term "hostile act" in the text of article 2, paragraph 2 of the General Armistice Agreement, which says "No element of the land, sea or air military or para-military forces of either party including non-regular forces, shall commit any warlike or hostile act against the military or para-military forces of the other party. . . ."

It follows, therefore, that I have no other choice but to cast my vote with Egypt that the Mixed Armistice Commission does not have the right to demand from the Egyptian Government that it should not interfere with the passage of goods to Israel through the Suez Canal.

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As Chief of Staff of the United Nations Truce Supervision Organization, I am forced to base my position in this matter on the specific provisions of the General Armistice Agreement signed by Egypt and Israel. I deliberately avoid, therefore, any consideration of the status of the Suez Canal or the rights of any party with regard to it.

While I feel bound to take this technical position on the basis of the relevant provisions of the General Armistice Agreement I must also say that the action of the Egyptian authorities in this instance, is, in my view, entirely contrary to the spirit of the General Armistice Agreement and does, in fact, jeopardize its effective functioning. It was certainly never contemplated at Rhodes that what is, in effect, an act of blockade or at least an act undertaken in the spirit of a blockade and having the partial effect of one, would be continued by one of the parties to the General Armistice Agreement more than two years after it had been signed.

Although, in my view, there is no adequate basis for agreeing that the Mixed Armistice Commission has competence to deal with the question, it must be clear, and it certainly is to me, that the question cannot rest here. Either the Egyptian Government must, in the spirit of the General Armistice Agreement relax the practice of interference with the passage of goods destined for Israel through

the Suez Canal, or the question must be referred to some higher competent authority such as the Security Council or the International Court of Justice.

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Because of the effect which such continued action will have on the implementation of the Armistice Agreement and the future operations of the Mixed Armistice Commission, I am compelled to direct a strong request to the Egyptian delegate to intercede with his Government to desist from the present practice of interfering with goods destined for Israel through the Suez Canal, since such acts can only be construed as inconsistent with the spirit of the Armistice Agreement.⁸³

The representatives of Egypt, while belittling the significance of the Chief of Staff's finding that the interference is "an aggressive and hostile act" and "contrary to the spirit of that (General Armistice) Agreement,"⁸⁴ argued that the Report constituted a vindication of the Egyptian contention that the restrictive practices were not contrary to the Armistice Agreement.⁸⁵ Contrary to the views of Israel and other members, who argued that the Armistice Agreement was *sui generis*, the Egyptian representative claimed:

The fact that the Armistice Agreement is silent on this point (i.e. the right of visit and search), although it is fairly common practice to include a provision on this subject in armistice agreements, shows, as indeed the Mixed Armistice Commission has confirmed, that the armistice agreement of classical type concluded between Egypt and Israel expressed the joint will of the signatories and left them free to exercise their legitimate right of visit and search.⁸⁶

Although this view was explicitly rejected by Israel (a fact which makes the assertion of "the joint will" rather problematical)⁸⁷ and also by the Security Council in its resolution of September 1, 1951,⁸⁸ Egypt persisted in invoking the Report in justification of its restrictive practices. It may therefore be useful to examine the Report in some detail.

⁸³ U.N. Doc. S/2194: Cablegram dated June 12, 1951, to the Secretary General from the Chief of Staff of the Truce Supervision Organization, transmitting a report to the Security Council; Official Records, 6th Year, Supp. April-June, 1951, pp. 162-164.

⁸⁴ The representative of Egypt claimed that these findings relate "exclusively to his activities as a self-appointed jurist and as a gentleman-at-large." Official Records, 549th Meeting, July 26, 1951, p. 17. The United Kingdom representative, on the contrary, believed that "any opinion which he expresses should command great respect in this Council." *Ibid.*, 550th Meeting, Aug. 1, 1951, p. 20 f, par. 95 f.

⁸⁵ *Ibid.*, 553rd Meeting, Aug. 16, 1951, p. 13, par. 52, and p. 25, par. 108.

⁸⁶ *Ibid.*, 661st Meeting, March 12, 1954, p. 9, par. 43 f. and p. 13, par. 64.

⁸⁷ *Ibid.*, 549th Meeting, July 26, 1951, pp. 9-11, and 661st Meeting, March 12, 1954, p. 29, par. 144. Israel's representative, after referring to Dr. Bunche's view, quoted *supra*, p. 545, and the Report of the Chief of Staff, declared: ". . . all these are unanimous in asserting that whatever may be the character of other armistice agreements, this Armistice Agreement is not compatible with active belligerency or with the exercise by either party of visit, search or seizure." See also statement by Peruvian delegate, Official Records, 688th Meeting, Jan. 13, 1955, p. 7, par. 27.

⁸⁸ As well as by a majority of members of the Security Council in voting in 1954 for the reaffirmation of the 1951 resolution.

The Report clearly does not state that the Egyptian practices, which are called "an act of blockade . . ." are consistent with the Armistice Agreement as claimed by Egypt. It explicitly states that they are "contrary to" and "inconsistent with" the spirit of the Agreement. The Report states, however, after what must have been careful consideration, "that there is no adequate basis for agreeing that the Mixed Armistice Commission has competence to deal with the question." Members of the Security Council generally construed the Report in this sense, although some expressed a reservation on this point.⁸⁰

The decisive consideration in determining the compatibility of the Egyptian actions with the Armistice Agreement should be, it is submitted, their aggressive and hostile character, as well as the fact that, performed by the official forces of Egypt, they are attributable to the Government of Egypt. On the basis of these two tests and in view of the circumstance that the Government of Egypt openly insists on performing the belligerent right of visit, search and seizure, there should be no difficulty in concluding that Egyptian restrictive practices are incompatible with the Armistice Agreement.

3. *Compatibility of the Restrictive Practices with the Convention of Constantinople of 1888*

During the debates in the Security Council the question was frequently raised whether the Egyptian restrictions were compatible with the provisions of the Constantinople Convention. The resolution of September 1, 1951, itself makes no explicit reference to this Convention.

One of the outstanding characteristics of the Convention is the "neutralization" of the Canal, that is, the establishment in Article 1 of the principle of freedom of navigation in both peace and war for ships of all nations. Thus, even assuming the correctness of the Egyptian contention, namely, that a state of war continues to exist, Israeli ships have a right of passage through the Canal. Articles 9 and 10 authorize the Egyptian Government, as an exception to Articles 4, 5, 6, 7, and 8, to take "the necessary measures for enforcing the execution of the said Treaty" and to take such measures which it might find necessary to assure by its "own forces the defense of Egypt and the maintenance of public order." It will be noticed that the exceptions listed in Articles 9 and 10 do not include Article 1, which is therefore one which Egypt is bound to respect in all circumstances. This would be so even without the specific statement in Article 11:

"The Egyptian representative stated in the Security Council that "this decision of 12 June 1951 was taken after consultation with the United Nations Secretariat, particularly with the Legal Department." Official Records, 662nd Meeting, March 23, 1954, p. 9, par. 34. This consultation does not appear in public documents of the United Nations.

⁸⁰ See, e.g., the remarks by the American representative: "My Government believes that this may be technically correct, but it is difficult to consider the Egyptian actions as thereby justified merely because the officials who enforce the restrictions cannot be classified as military or para-military forces of Egypt." Official Records, 552nd Meeting, Aug. 16, 1951, p. 10, par. 45. See also remarks by the New Zealand delegate, *ibid.*, 662nd Meeting, March 23, 1954, p. 5, par. 19.

The measures taken in the cases provided for by Articles 9 and 10 of the present Treaty shall not interfere with the free use of the Canal.

It follows then, as the Prize Court of Alexandria held, that Egypt may exceptionally take "reasonable and necessary measures,"⁹¹ but such measures must "not interfere with the free use of the Canal." The Convention thus lays down the limit beyond which Egypt is not authorized to go. Egypt argued, of course, that visit and search, as well as seizure, "cannot be regarded as prejudicing free passage through the Canal, and therefore as contrary to the Convention of Constantinople of 1888."⁹² As pointed out already, Egypt is not the final arbiter in determining whether these measures conform to the requirements of the Convention.⁹³ Members of the Security Council did contend that they are "undoubtedly incompatible" with the Convention.⁹⁴

The restrictive practices of Egypt having been considered at variance with the Constantinople Convention, an even stronger case can be made against the complete prohibition of passage of Israeli ships through the Canal. The power to take reasonable and necessary measures is power to regulate, not to prohibit, passage through the Canal. In this context reference may be made to the judgment of the International Court of Justice in the *Corfu Channel* case which clearly established this essential distinction. After holding that the North Corfu Channel "should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace," the Court went on to declare as follows:

On the other hand, it is a fact that the two coastal States did not maintain normal relations, that Greece had made territorial claims precisely with regard to a part of Albanian territory bordering on the Channel, that Greece had declared that she considered herself technically in a state of war with Albania, and that Albania, invoking the danger of Greek incursions, had considered it necessary to take certain measures of vigilance in this region. The Court is of opinion that Albania, in view of these exceptional circumstances, would have been justified in issuing regulations in respect of the passage of warships through the Straits, but not in prohibiting such passage or in subjecting it to the requirement of special authorization.⁹⁵

As the parallelism between this case and the Suez Canal situation, grounded on the pretended existence of a technical state of war, is obvious, several conclusions suggest themselves: First, if the principle laid down by customary international law and applied by the Court governs passage through the Corfu Straits, it follows *a fortiori* that it governs passage

⁹¹ Cf. *supra*, pp. 535-536.

⁹² Official Records, 661st Meeting, March 12, 1954, p. 15, par. 74, and p. 17, par. 87.

⁹³ See *supra*, p. 537.

⁹⁴ Cf., e.g., the remarks of the Netherlands representative, Official Records, 553rd Meeting, Aug. 16, 1951, p. 5, pars. 16-17; of the representative of Ecuador, *ibid.*, p. 27, par. 123.

⁹⁵ [1949] I.C.J. Rep. 4 at 29; 43 A.J.I.L. 558 at 577 (1949).

through the Suez Canal. In the latter case the principle of customary international law is reinforced by the conventional principle of Article 1 of the Constantinople Convention. Secondly, if the principle governs the passage of warships, it follows *a fortiori* that it must govern the passage of merchantmen. Thirdly, if in consequence of the existence of a technical state of war Albania was justified in regulating the passage of warships but not in prohibiting or subjecting it to the requirement of special authorization, the authorization granted to Egypt under the Constantinople Convention appears to be similarly limited. If Egypt claims to be entitled to impose stricter regulations, the burden of proof rests on the claimant state. Fourthly, if the measures indicated by the Court are excluded even in the case of warships, it follows *a fortiori* that they are excluded in the case of merchant vessels.

Since the view of many members of the Security Council was based on a reasoning along the lines suggested above, it may arouse some astonishment that the resolution of September 1, 1951, does not explicitly pronounce on the question of compatibility of the Egyptian practices with the Constantinople Convention. The reason may well be that the members were unsure whether the Council had competence to make such a direct pronouncement. Article 8 of the Convention provides:

The Agents in Egypt of the Signatory Powers of the present Treaty shall be charged to see that it is carried out. In any circumstances threatening the security and free passage of the Canal, they shall meet at the summons of three of them and under the presidency of the Doyen, to make the necessary verifications. They shall inform the Khedivial Government of the danger perceived, in order that it may take proper steps to assure the protection and the free use of the Canal.

It would require going beyond the compass of this paper to examine the applicability of this procedure to the problem posed by the Egyptian restrictions.⁹⁶

Suffice it to point out that Egypt, strongly supported by the Soviet Union, challenged the competence of the Security Council to deal with Israel's complaints on the ground that they related to the Constantinople Convention and that the procedure provided for in the Convention should be utilized.⁹⁷ Israel, the complaining state, is not a party to the Convention.

⁹⁶ Also, and for the same reason, an analysis is omitted of the regime established for the passage of ships through the Canal by the United Kingdom in two World Wars, a matter which was discussed at some length, though inconclusively, by the representatives of Egypt. See Official Records, 555th Meeting, Aug. 27, 1951, p. 8 f. On this aspect see R. R. Borchers, "Passage of Ships through International Waterways in Time of War," 31 Int'l L. Yr. Bk. of Int. Law 187-216 at 196, 206-208 (1954).

⁹⁷ The representative of Egypt said: "It is Article 8 which you should bring into operation, not the Security Council. Apply to the signatories' representatives in Cairo. You are perfectly entitled to complain of obstacles to the free passage of shipping through the Canal. I believe you know that the signatories are France, Germany, Austria-Hungary, Spain, Great Britain, Italy, The Netherlands, Russia and the Ottoman Empire. These countries exist. They even have successors. . . . You can find three to call together the signatories' representatives in Cairo. Take your case to them."

tion and could therefore not invoke the procedure of the Convention.⁹⁸ The Security Council did not, however, accept the Egyptian viewpoint regarding its competence in the matter. As was pointed out by several members, the Council is competent to deal with threats to the peace, including threats arising out of the non-observance of the Constantinople Convention. As the French representative stated:

The Council is not competent to impose observance of the Constantinople Convention as such. It is, primarily and solely, the organ mainly responsible for the maintenance of international peace and security. More particularly, the Council has the paramount right of supervising the execution of the armistice agreements negotiated under its auspices between Israel and the neighboring Arab States.

. . . *The Council is competent to supervise its application in this case* in view of the special situation created between Egypt and Israel under the General Armistice Agreement of 1949.⁹⁹

In view of this strong statement, which was shared by other members of the Council both as to the competence of the Security Council and the incompatibility of Egypt's pretended rights with its obligations under the Constantinople Convention,¹⁰⁰ it is probably regrettable that the Council chose not to include an explicit finding to this effect in its resolution of September 1, 1951, or in the draft resolution of 1954, and, in connection with the *Bat Galim* incident, deemed it inexpedient to declare so unequivocally.¹⁰¹ Nevertheless, in the public mind the impression persists that the Security Council based its action against Egypt squarely on that ground.

4. Egypt's Right of Self-Defense or Self-Preservation as Basis for Restrictive Practices

In the course of the several debates centered on Israel's complaints, it became standard practice for Egyptian representatives to invoke the right

plaint to them. But to raise the question of free passage through the Suez Canal in the Security Council is wrong. It is completely at variance with Article 24 of the United Nations Charter." Official Records, 662nd Meeting, March 23, 1954, p. 14, par. 47. For the remarks of the Soviet representative see *ibid.*, 664th Meeting, March 29, 1954, p. 10, pars. 52-56.

⁹⁸ The Egyptian representative said: "For so far as the Egyptian Government is concerned, the State of Israel has nothing to do with the 1888 Convention. It was not a signatory to the Convention; at the time the Convention was signed it was not yet in existence." *Ibid.*, 659th Meeting, Feb. 15, 1954, p. 23, par. 123.

⁹⁹ Official Records, 687th Meeting, Jan. 4, 1955, p. 10, pars. 56-57. See also the French statement *ibid.*, 663rd Meeting, March 25, 1954, p. 8, pars. 34-35. Italics supplied.

¹⁰⁰ On the first point, the representative of Belgium stated: "As has been pointed out, the Security Council is clearly not competent to enforce the observance of the Constantinople Convention as such. It does, however, possess such competence through the Charter, insofar as it has to carry out the provisions of the Charter in order to ensure the maintenance of peace and international security. The 1951 resolution was therefore the outcome of a proper use of the Council's powers, and was not *ultra vires*." *Ibid.*, 688th Meeting, Jan. 13, 1955, p. 3, par. 9.

¹⁰¹ This may well have been due to the belief that a resolution would be opposed by the Soviet Union.

of self-preservation or self-defense as a juridical justification for Egyptian restrictive practices. This right, said the representative of Egypt, is "universally recognized and known to transcend all other rights";¹⁰²

at the root of all existence, of all survival, individual or national . . . it is part and parcel of the Charter and the very concept of the United Nations, and . . . it is the main patrimony and the highest privilege of every individual, every community, every nation and every group of nations, except the damned and the fools.¹⁰³

Members of the Security Council generally rejected this claim on the ground that no actual hostilities were in progress.¹⁰⁴ The representative of The Netherlands stated that two years after signing the Armistice Agreement Egypt

does not require to exercise the belligerent right of visit, search and seizure for any legitimate purpose of self-defence. Besides, as far as self-defence is concerned, something has changed in our world since the closing years of the nineteenth century. Today we, the Members of the United Nations, live—or at least should live—by the Charter of our Organization.¹⁰⁵

The position of the Council found expression in the resolution of September 1, 1951. It has, moreover, been restated recently by the Secretary General of the United Nations. Interpreting the assurances given him by Israel and Egypt to respect unconditionally the cease-fire injunction subject to the right of self-defense under Article 51, the Secretary General declared that this reserve applies

in cases of non-compliance by the other party with its obligation under the Charter, or under the Armistice Agreement, only if and when such non-compliance is found to be a reason for the exercise [Sic!] of the right of self-defence as recognized in Article 51 of the Charter. The Security Council alone can decide whether this is the case or not. The reserve for self-defence in the several cease-fire assurances and the significance it may give to compliance with the Charter, other clauses in the Armistice Agreement or relevant Security Council decisions, is thus under the sole jurisdiction of the Security Council, in accordance with the rules established.

In particular, the reservation of self-defense "could not derogate from the obligations assumed under Article 2, paragraph 2, of the Armistice Agreement between Egypt and Israel." Neither, according to his interpretation, said the Secretary General, does it "permit acts of retaliation which repeatedly have been condemned by the Security Council."¹⁰⁶

¹⁰² Official Records, 549th Meeting, July 26, 1951, p. 21, par. 78.

¹⁰³ *Ibid.*, 550th Meeting, Aug. 1, 1951, p. 8, par. 42. See pp. 6-8 for authority cited by the representative. See also the representative's observation *ibid.*, 661st Meeting, March 12, 1954, p. 14, pars. 67-73; 659th Meeting, Feb. 15, 1954, p. 9, par. 50.

¹⁰⁴ See remarks by the British representative *ibid.*, 550th Meeting, Aug. 1, 1951, p. 20, par. 93.

¹⁰⁵ *Ibid.*, 553rd Meeting, Aug. 16, 1951, p. 4, par. 15.

¹⁰⁶ U. N. Doc. S/3596, May 9, 1956: Report of the Secretary General to the Security Council pursuant to the Council's resolution of April 4, 1956, on the Palestine Question, para. 13, 14.

The Secretary General's interpretation is particularly illuminating and to the point as Egypt appeared to justify its practices of restriction and interception by invoking the right of self-defense or self-preservation with respect to alleged infringements of various clauses of the Armistice Agreement by Israel.¹⁰⁷ These acts then assume the character of retaliation, which, in the case of Israel, have been condemned by the Security Council. By parity of reasoning, such retaliatory actions by Egypt, whether or not based on or derived from the right of self-defense, are equally inadmissible.¹⁰⁸

VI. SECURITY COUNCIL ACTION WITH RESPECT TO EGYPT'S RESTRICTIVE PRACTICES

1. *Resolution of September 1, 1951*

When Israel lodged its first complaint with the Security Council, a resolution was adopted on November 17, 1950, reminding the parties of their pledges of "no hostilities" and postponing further consideration until the submission of a report by the Mixed Armistice Commission.¹⁰⁹ In July, 1951, the Council began the consideration of the second Israeli complaint in the light of the Report of the Special Committee of June 12, 1951,¹¹⁰ the relevance of which has already been discussed.¹¹¹ The Council debated the issues from political as well as juridical points of view. The majority of the members of the Security Council firmly rejected every one of the Egyptian contentions as unfounded.

The Council voted on the tripartite draft resolution, as amended,¹¹² on September 1, 1951. The vote was eight in favor (Brazil, Ecuador, France, Netherlands, Turkey, United Kingdom, United States of America, Yugoslavia), none against, and three abstentions (China, India, U.S.S.R.). China and India abstained because on the one hand they did not feel that the legal issues had been adequately dealt with, and on the other hand they were not convinced in view of the opposition of Egypt that the resolution

¹⁰⁷ See remarks by the Egyptian delegate in Official Records, 686th Meeting, Dec. 7, 1954, p. 25, par. 136 *et seq.*

¹⁰⁸ Said the Brazilian representative: "Should we accept the Egyptian thesis, we would be bound to recognize any measures of reprisal adopted by the Israel Government." Official Records, 552nd Meeting, Aug. 16, 1951, p. 12, par. 56.

¹⁰⁹ U. N. Doc. S/1899; Official Records, 522nd Meeting, Nov. 13, 1950, p. 15, and 524th Meeting, Nov. 17, 1950, p. 15.

¹¹⁰ U.N. Doc. S/2194; Official Records, 6th Year, Supp. April-June, 1951, pp. 162-164.

¹¹¹ *Cf. supra*, pp. 546 ff.

¹¹² The amendment, which was adopted, related to par. 3 of the draft resolution, the original text of which was: "Noting that the Chief of Staff of the Truce Supervision Organization in his report to the Security Council of 12 June 1951 considered interference with the passage through the Suez Canal of goods destined for Israel to be a hostile and aggressive act, and contrary to the spirit of the Armistice Agreement, the effective functioning of which is thereby jeopardized." The Yugoslav delegate found this passage to be of exceptional gravity, and the American representative introduced the revision which was adopted. Official Records, 553rd Meeting, Aug. 16, 1951, p. 30, par. 142; p. 31, par. 145, and note 3.

would contribute towards peace and stability in the area. Soviet Union never participated in the discussion.¹¹³

The resolution as adopted ¹¹⁴ reads as follows:

The Security Council,

1. Recalling that in its resolution of 11 August 1949 (S/137) relating to the conclusion of Armistice Agreements between Israel and its neighbouring Arab States it drew attention to the pledges in the Armistice Agreements "against any further acts of hostility" between them;
2. Recalling further that in its resolution of 17 November 1947 (S/107 and Corr. 1), it reminded the States concerned that the Armistice Agreements to which they are parties contemplate "the achievement of permanent peace in Palestine," and therefore urged the States concerned to take all such steps as will lead to the settlement of the issues between them;
3. Noting the report of the Chief of Staff of the Truce Supervision Organization to the Security Council of 12 June 1951 (S 2194);
4. Further noting that the Chief of Staff of the Truce Supervision Organization recalled the statement of the senior Egyptian delegate in Rhodes on 13 January 1949, to the effect that his delegation was "inspired with every spirit of co-operation, conciliation and a sincere desire to restore peace in Palestine," and that the Egyptian Government has not complied with the earnest plea of the Chief of Staff of the Truce Supervision Organization to the Egyptian delegate on 12 June 1951, that it desist from its present practice of interfering with the passage through the Suez Canal of goods destined for Israel;
5. Considering that since the armistice regime, which has been in existence for nearly two and a half years, is of a permanent character, neither party can reasonably assert that it is actively a belligerent and requires to exercise the right of visit, search, and seizure for any legitimate purpose of self-defence;
6. Finds that the maintenance of the practice mentioned in paragraph 4 above is inconsistent with the objectives of a peaceful settlement between the parties and the establishment of a permanent peace in Palestine set forth in the Armistice Agreement;
7. Finds further that such practice is an abuse of the exercise of the right of visit, search and seizure;
8. Further finds that that practice cannot in the prevailing circumstances be justified on the ground that it is necessary for self-defence;
9. And further noting that the restrictions on the passage of goods through the Suez Canal to Israel ports are denying to nations at all times connected with the conflict in Palestine valuable supplies required for their economic reconstruction, and that these restrictions together with the sanctions applied by Egypt to certain ships...

¹¹³ On one occasion, for unexplained reasons, the Soviet Union insisted on a postponement of the debate for 48 hours. Official Records, 556th Meeting, Aug. 27, 1951, p. 6.

¹¹⁴ U.N. Doc. S/2298/Rev. 1; Official Records, 558th Meeting, Sept. 1, 1951, p. 1. The resolution was subsequently issued as a separate document under the symbol S/2322.

have visited Israel ports represent unjustified interference with the rights of nations to navigate the seas and to trade freely with one another, including the Arab States and Israel,

10. Calls upon Egypt to terminate the restrictions on the passage of international commercial shipping and goods through the Suez Canal wherever bound and to cease all interference with such shipping beyond that essential to the safety of shipping in the Canal itself and to the observance of the international conventions in force.

The resolution notes the Report of the Chief of Staff which declared the exercise of restrictions by Egypt to be "in effect, an act of blockade," a "hostile and aggressive action" contrary to the spirit of the General Armistice Agreement.¹¹⁵ It also noted the appeal addressed by the Chief of Staff to the Egyptian delegate to desist from the "present practice." The resolution rejects the Egyptian claim that it or Israel is still "actively a belligerent," and that "the exercise of the right of visit, search and seizure" is required "for any legitimate purpose of self-defense." But it will be noted that the resolution does not directly repudiate the Egyptian contention that, in spite of the Armistice, a "state of war" continues to exist, although it rejects all the consequential rights which Egypt claimed as flowing from it.¹¹⁶ It must, of course, be conceded that the Security Council is free to choose the juridical or political ground on which it desires to take a stand on an issue of which it is seized. In this case the Council chose not to pronounce on what it considered a technical and probably secondary aspect of the issue, although it was pressed earnestly by Israel. It believed itself to be—and no doubt it is—legally on solid ground when it ruled in paragraphs 5, 6, 7 and 8 that the belligerent rights

¹¹⁵ See *supra*, p. 547. Commenting on this on behalf of the three sponsoring Powers, the British delegate said: "The Armistice Agreement was meant to terminate all hostile acts, and it was so understood both by the parties and by the Security Council itself. . . . The restrictions which applied to Egypt were terminated by the Security Council resolution (S/1376) of August, 1949, and there can be no justification for the attempt by Egypt to maintain against Israel restrictions similar to those from which Egypt itself was released two years ago." Official Records, 552nd Meeting, Aug. 16, 1951, p. 4, par. 12.

¹¹⁶ In commenting upon it the British delegate expressed himself as follows: "Egypt claims that there is a state of war and that it is therefore entitled to exercise belligerent rights. It is not necessary, in our view, for the Council to pronounce on this. Even if it were self-evident that a state of war existed—which is by no means the case, of course—this would in itself afford no justification for the maintenance of the restrictions at the present time and in the light of the present situation. What matters is not whether there is some technical basis for the restrictions, but whether it is reasonable, just and equitable that they should be maintained. This is the principle on which the draft resolution before the Council has been formulated, and it is on this issue that we consider the Council should pronounce." *Ibid.*, p. 3, par. 7. Adverting to the same theme later in his speech, he said: "For the reasons which I have already stated, the draft resolution does not attempt to say whether or not Egypt can technically claim to be entitled to belligerent rights. What the draft resolution does say is that, in the light of the Armistice Agreement and of what has taken place since it was signed, the maintenance of the present restrictions is unjustified and unreasonable and must be held to constitute an abuse of any rights which Egypt may claim to possess." *Ibid.*, par. 10.

of visit, search, and seizure claimed by Egypt were inconsistent with the armistice regime and could not be justified on grounds of self-defense. It thus construed the Armistice Agreement as one *sui generis* and not doing rejected the Egyptian contention that it was of the classical variety, and that, since it did not expressly prohibit the right of visit, search, and seizure, the exercise of this right was permissible. Having done so, one may wonder why the Council found it necessary to characterize the exercise of this right of visit, search and seizure as an "abuse." While the doctrine of abuse of right is gaining ground in international law, its place in the system of the resolution is not clear. If the right in question is declared to be inconsistent with the armistice regime and cannot be regarded as legal, was it necessary to affirm that it constituted an abuse of right?

The meaning of this affirmation becomes clear when related to the language of the resolution and to the debate in the Council regarding the compatibility of Egyptian restrictions with its obligations and under the Constantinople Convention of 1888. In this debate it was conceded that Egypt has certain rights under the Convention, but it was affirmed that these rights are limited by Article 11, which reserves the right of "abuse." Both Egypt's rights and obligations are reaffirmed in paragraph 10 of the resolution, which calls on Egypt to terminate all interference with shipping through the Suez Canal "beyond that essential to the security of shipping in the Canal itself and to the observance of international conventions in force." One of the "conventions in force" is, of course, the Constantinople Convention. It is precisely because Egypt's interference exceeded the measures permissible under the Constantinople Convention that the Council qualified the interference as "abuse of the exercise of the right of visit, search and seizure." It is for the same reason that the United Kingdom representative declared, on behalf of the three sponsoring governments, that, in calling upon Egypt to terminate the restrictions in the Suez Canal,

we are not asking the Egyptian Government to give up any of the rights which it can legitimately claim to exercise in regard to the passage of ships through the Canal. The normal administration of the Canal must obviously continue, and the proper precautions must be taken to safeguard the Canal itself and the ships which pass through it. All this is specifically provided for in the draft resolution. All relevant international conventions must also be observed, including the Suez Canal Convention itself and any others, such as sanitary conventions, which may apply. What we want to see is the restoration of normal peacetime conditions in the Canal, providing for the unhindered passage of the ships of all nations.¹¹⁷

The Security Council thus drew a line between "reasonable and necessary measures for safeguarding freedom of passage for ships of all nations, including Israel, and the imposition of measures of visit, search and seizure and qualified the latter as an "abuse of right." Thus eleven months after Israel first appealed to the Security Council against Egypt's restric-

¹¹⁷ *Ibid.*, p. 3, par. 11.

tions, the Council finally found the complaint well founded. There can be no doubt that the Council proceeded slowly but it also moved deliberately.¹¹⁸ Egypt's reaction consisted in restating its position that "the assumptions on which the claim of Israel was based—or on which it tried to base itself—have yet to be proved," and in fully reserving "its rights in connexion with the present debate."¹¹⁹ More specifically, the Egyptian representative argued that the resolution "is in flagrant violation of the purposes of the United Nations, as formulated in Article 1 of the Charter, which govern the functions and powers of the Security Council"; that these powers and functions mentioned in Article 24, paragraph 2, "are limited and should be strictly regulated and governed by the fundamental principles and purposes laid down in" Article 1, paragraph 1; and that the resolution "in fact proposes that the Council violate the principles and practices of international law and the stipulations of Articles 1 and 24 of the Charter of the United Nations."¹²⁰

That the Security Council has, as the United Kingdom representative maintained, the "paramount right of supervising the execution of the Armistice Agreements"¹²¹ cannot and has not been doubted. In adopting the resolution the Council exercised this right. And the obligatory character of the findings laid down by the Council stems from the binding character of the Armistice Agreement and the Suez Canal Convention as well as from the fact that the former was concluded by Egypt and Israel pursuant to a resolution adopted by the Council under Chapter 7 of the Charter.¹²²

¹¹⁸ After the adoption of the resolution, the French representative recalled that several postponements were granted "to give the Egyptian Government time to find a way of adapting its behavior to the obligations incumbent upon it, on the one hand under the Armistice Agreement which it had concluded with Israel, and on the other hand under the international statute of the Suez Canal," and expressed disappointment that Egypt had failed to do so. *Ibid.*, 558th Meeting, Sept. 1, 1951, p. 5, pars. 18–19.

¹¹⁹ *Ibid.*, p. 7, pars. 28–29.

¹²⁰ *Ibid.*, 553rd Meeting, Aug. 16, 1951, p. 22, pars. 94–95. The Egyptian representative referred to Art. 1, par. 1, which states as one of the purposes "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." The sentence referred to in par. 2 of Art. 24 reads: "In discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nations."

¹²¹ Official Records, 687th Meeting, Jan. 4, 1955, p. 10, par. 56. The French representative referred to the Council as the "guardian" of the Armistice Agreement. *Ibid.*, 663rd Meeting, March 25, 1954, p. 8, par. 35.

¹²² With respect to the Constantinople Convention, it is relevant to recall the following statement by the Belgian delegate: "The 1951 resolution was therefore the outcome of a proper use of the Council's powers, and was not *ultra vires*. It could not, indeed, be represented in that light, since it contained nothing new and merely restated the provisions of the Convention of 1888. Actually, it restated them only in part, for it referred only to commercial shipping, whereas the Convention was also applicable to warships. Even if the resolution itself were not binding, its provisions would be, since they correspond to provisions which have been binding since 1888." *Ibid.*, 688th Meeting, Jan. 13, 1955, p. 3, par. 9.

2. *Egypt's Failure to Carry out the Security Council Resolution of September 1, 1951*

On January 28, 1954, Israel again complained to the Security Council that, in violation of the resolution of September 1, 1951, Egypt "has persisted in its illegitimate interference with shipping passing through the Suez Canal and has since extended the blockade to shipping passing on and from the Israeli port of Eilat on the Gulf of Aqaba"; and furthermore, these "illegal practices have been . . . recently aggravated."¹¹ Egypt freely admitted that it continued to act in defiance of the Security Council resolution of September 1, 1951, and its representative, in an effort to clear up the "misunderstanding" that the Egyptian measures were entirely contrary to the Security Council's decision of 1 September 1951, declared:

Egypt is taking action which is perhaps not in conformity with the Security Council's decision of 1 September 1951; I am prepared to recognize that. But at the same time, I would like to point out that this is the misunderstanding I want to clear up—that when the Security Council's decision was taken, Egypt received it in a different spirit. That spirit is illustrated in the statement made by the Egyptian representative who attended the meeting of the Security Council of 1 September 1951, at which this decision was taken.¹²

What the Egyptian representative said, in substance, was that Egypt never intended to carry out the decision of the Security Council of September 1, 1951, that it had so declared immediately after that decision was adopted, and that it would continue to do so. In a debate that was remarkable for the absence of any "tenable reason" for Egypt's refusal to comply with that resolution and equally for the absence of any "ten-

¹¹ U.N. Docs. S/3168 and S/3168/Add. 1; Official Records, 9th Year, Supp. and March, 1954, p. 2, par. 2 and p. 3, par. 4. The aggravation, that is, the extension of the restrictive measures to the Gulf of Aqaba and the inclusion of food among the goods to be regarded as "war contraband" was instituted, said the Israeli representative, Jan. 25, 1954. *Ibid.*, p. 3, par. 3. The decision referred to declared that "Egypt should take sterner measures to attain the desired end" (*ibid.*, pp. 4, 5), and contrasted sharply with the alleged voluntary relaxation of the restrictive measures by Egypt. See also statement by Israel's representative, Official Records, 658th Meeting, Feb. 10, 1954, p. 1 ff.

¹² He went on to say: "Thus Egypt accepted the Security Council's decision of September 1951, within the limits of that statement, which made it clear that Egypt was not convinced that the discussion was ended, that in its view the question was not closed and that the decision did not rest on fixed and final foundations. That is our conviction in September 1951. That is still our conviction and we accordingly remain on the same viewpoint and the same position. It is therefore beside the point to state now that Egypt is acting in a manner incompatible with the decision taken by the Security Council on 1 September 1951. Egypt will continue to maintain the same position because it is convinced, as its representative said at the very moment the decision was taken, that the decision was not based on exhaustive studies or conclusive opinions." Official Records, 659th Meeting, Feb. 15, 1954, p. 25, par. 135, and p. 23, par. 136. For the Egyptian representative's statement at the Sept. 1, 1951, meeting, see *supra*, p. 558.

legal argument,"¹²⁵ members rejected the Egyptian "reservations" and indeed repudiated its right to make any such "reservations." Thus the New Zealand representative declared:

We cannot accept the argument that Egypt is entitled to disregard the terms of the resolution of September 1951 by reason of a reservation entered at the time of its adoption.¹²⁶

The Danish representative referred to Article 25 of the Charter and pointed out:

There is no reservation to this. The obligation to accept and carry out is not limited to such decisions as you agree with and consider legal.¹²⁷

The New Zealand representative accordingly introduced a draft resolution on March 23, 1954, which addressed itself primarily to the "incontestable and indeed uncontested fact that the clear and precise provisions of the 1951 resolution have not been complied with."¹²⁸ The draft resolution, after recalling the whole of the resolution of September 1, 1951,¹²⁹ "notes with grave concern that Egypt has not complied with that resolution," and "calls upon Egypt in accordance with its obligations under the Charter to comply therewith."¹³⁰ This paragraph, noted the French representative, "is manifestly based on Article 25 of the Charter."¹³¹

The United Kingdom representative, while refraining from submitting a

¹²⁵ See remarks by British and French representatives, Official Records, 663rd Meeting, March 25, 1954, p. 5, par. 23, and p. 7, par. 31. For Egyptian restatements see *ibid.*, 658th Meeting, Feb. 5, 1954, p. 26; 659th Meeting, Feb. 15, 1954, pp. 1 ff., 23 ff.; 661st Meeting, March 12, 1954, pp. 2 ff.

¹²⁶ *Ibid.*, 662nd Meeting, March 23, 1954, p. 4, par. 17.

¹²⁷ *Ibid.*, 663rd Meeting, March 25, 1954, p. 3, par. 12. He continued as follows: "All Member States in ratifying the Charter agreed to a limitation of their sovereignty. If the Council accepted that a Member State that disagreed with one of its decisions, by calling such decisions illegal was not bound by the decision, the work of the Council would become chaotic. For any State ready to shoulder the responsibility for aggression surely would be only too willing to accuse the Council of acting illegally. We might then foresee an entire technique of evasion develop. The smaller nations cannot possibly want such developments to take place." (p. 4, par. 13.)

¹²⁸ *Ibid.*, 662nd Meeting, March 23, 1954, p. 3, par. 9. See also remarks by the U. S. representative, *ibid.*, 663rd Meeting, March 25, 1954, p. 1, par. 1, p. 2, par. 5; the French representative, *ibid.*, p. 7, par. 31, p. 9, par. 41; the Brazilian delegate, *ibid.*, 664th Meeting, March 29, 1954, p. 5, par. 16; and the Colombian delegate, *ibid.*, p. 5, par. 22.

¹²⁹ Statement by the New Zealand representative, *ibid.*, 662nd Meeting, March 23, 1954, p. 5, par. 21.

¹³⁰ U.N. Doc. S/3188 and Corr. 1; Official Records, 9th Year, Supp. Jan.-March, 1954, p. 44. The final paragraph of the draft resolution refers, "without prejudice to the provisions of the resolution of 1 September 1951," Israel's complaint regarding passage through the Gulf of Aqaba to the Mixed Armistice Commission. According to statements by the American, French, and British representatives, the passage of ships through the Gulf was covered by the same principles already enunciated with respect to the Suez Canal. As the question had not yet been considered by the Commission and in order to maintain the normal procedure, it was proposed to refer the question first of all to the Commission. Official Records, 663rd Meeting, March 23, 1954, p. 2, par. 6; p. 6, pars. 27, 28; p. 9, pars. 38, 39.

¹³¹ *Ibid.*, p. 9, par. 41.

formal amendment to the New Zealand draft resolution, put on record his government's view "that if, as I sincerely hope will not be the case, Egypt has not within ninety days complied with the resolution, the Council should stand ready to take the matter up again."¹³²

The Egyptian representative declared the adamant opposition of his government, saying: "This draft resolution is not accepted by Egypt. Egypt rejects it with utmost vigour, just as it rejected the 1951 resolution."¹³³ The Soviet representative, intervening for the first time in the substantive discussion of the issue, challenged the jurisdiction of the Council,¹³⁴ and proposed that instead of attempting to impose a decision upon one of the parties which "has been stated by that party to be absolutely unacceptable from the outset," the Council should "appeal to both parties to take steps to settle their difference on this question by means of direct negotiations."¹³⁵

The draft resolution was put to the vote on March 29, 1954, and not adopted, the vote being eight in favor (Brazil, Colombia, Denmark, France, New Zealand, Turkey, United Kingdom, United States), two against (Lebanon, U.S.S.R.), and one abstention (China).¹³⁶ This was the second time that the Soviet Union interposed its veto in a vote on a question relating to Palestine.¹³⁷ It marked the change from the position of abstention which the Soviet Union had followed since 1948 to one of active support of the Arab States against Israel. It must be admitted, however, that the Soviet proposal to call for direct negotiations between Israel and Egypt had some merit, particularly if these negotiations were to be conducted on the basis of the resolution of September 1, 1951. In view of the persistent refusal of the Arab States to enter into such direct negotiations with Israel, it may be doubtful that a call from the Council would have been heeded by Egypt.

It remains to note that after the vote the French representative observed that the Soviet veto "could not have caused repeal of a legally adopted resolution."¹³⁸ The representative of Israel similarly expressed his government's understanding that

the law of the United Nations in the Suez Canal and in the Gulf of Aqaba is . . . the valid and unrepealed resolution of the Security Council adopted on 1 September 1951.¹³⁹

¹³² *Ibid.*, 664th Meeting, March 29, 1954, p. 11, par. 61; see also 663rd Meeting, March 25, 1954, p. 6, par. 26, for a similar statement.

¹³³ And for the same reason: "It is convinced that the two texts do not deal with the question as it should be dealt with. The legal element, which is fundamental to this dispute, is completely ignored in both." *Ibid.*, 662nd Meeting, March 23, 1954, p. 15, par. 49.

¹³⁴ This challenge, based on Art. 8 of the Constantinople Convention, has already been dealt with. See *supra*, p. 551.

¹³⁵ Official Records, 664th Meeting, March 29, 1954, p. 9, paras. 45-50; p. 10, paras. 52-56.

¹³⁶ *Ibid.*, p. 12, par. 69.

¹³⁷ The first Soviet veto occurred in connection with the question of water from the River Jordan, at the 656th Meeting, Jan. 22, 1954, p. 27, par. 135.

¹³⁸ *Ibid.*, 664th Meeting, March 29, 1954, p. 18, par. 113.

¹³⁹ *Ibid.*, p. 21, par. 141.

3. *The Security Council and the Interception of the Israeli Ship, Bat Galim, by Egypt*

At the end of the Security Council debate on March 29, 1954, the representative of Egypt declared that, freed from the pressure of the New Zealand draft resolution, Egypt "will of its own free will move towards tolerance." As a token of this spontaneous tolerance Egypt, six months later, on September 28, 1954, intercepted the first Israeli ship, the *Bat Galim*, which, on the strength of the September 1, 1951, Security Council resolution, attempted to pass through the Suez Canal with a cargo of meat.¹⁴⁰ The Egyptian charges against the *Bat Galim*, namely, that its crew attacked two fishing boats with automatic fire and killed two fishermen, are immaterial, as they were dismissed by the Mixed Armistice Commission as "unfounded."¹⁴¹ The incident was discussed at several meetings of the Security Council. The discussion revealed a good deal of satisfaction at the high standard of Egyptian administration of justice in dismissing the charges against the Israeli seamen and their release, as well as at the unfulfilled promise to release the cargo and the ship. There was remarkably little disposition to examine the heart of the matter, to wit, that, contrary to the resolution of September 1, 1951, the Armistice Agreement as construed by the Mixed Armistice Commission and the Security Council, and the Constantinople Convention, Egypt had intercepted an Israeli merchantman and by separating the crew from the ship had prevented its passage through the Suez Canal. The representative of the United Kingdom, to be sure, did express his hope that the grave charges against the crew having been "withdrawn when they could not be substantiated . . . the Egyptian Government could thereafter have seen its way to letting the ship proceed on its course through the Canal, under such security restrictions as seemed appropriate in the circumstances."¹⁴² The French delegate correctly interpreted the Egyptian statements regarding the release of the cargo and the ship "to mean that the Egyptian Government maintains its claim that it is entitled to forbid passage through the Suez Canal to any vessel flying the Israel flag and manned by an Israel crew," and asked "that Egypt should abide by the Council's decision" of September 1, 1951, to terminate the restrictions on the passage of "international commercial shipping."¹⁴³ The United States representative declared:

Further action to give full effect to the decision of 1 September 1951, to allow the passage of the *Bat Galim*, an Israel ship, to Israel, and to cease interference with Israel shipping as well as with neutral shipping carrying goods to and from Israel, will confirm our respect for Egypt as the legitimate custodian of the Suez Canal, only recently

¹⁴⁰ The facts of this incident are discussed above, pp. 541 ff.

¹⁴¹ U. N. Doc. S/3323; Official Records, 9th Year, Supp. Oct.-Dec. 1954, p. 30 at 41.

¹⁴² Official Records, 687th Meeting, Jan. 4, 1955, p. 8, par. 46. He went on to say: "Though it would, of course, have left all the questions of principle untouched, this would at least have settled the adventures of this particular ship in a more or less satisfactory manner."

¹⁴³ *Ibid.*, p. 9, par. 52, and p. 10, pars. 58-59. The Egyptian statement will be found *ibid.*, pp. 5 ff., pars. 33-34.

reasserted by Egypt's historic agreement with the United Kingdom. Anything less than this will not be consistent with the spirit and letter of the resolution of 1 September 1951, nor, in our opinion, with its express terms.

... Israel has shown forbearance and restraint in the conduct of the case here. Israel might well have shown impatience and resentment that it was not granted immediate satisfaction in such a case as this where the majority of the members of the Council have shown that they believe the right to be on Israel's side.¹⁴⁴

Similar views were voiced by the representatives of Belgium,¹⁴⁵ New Zealand,¹⁴⁶ and Brazil.¹⁴⁷ The Egyptian contention that the 1951 resolution did not apply to Israeli ships¹⁴⁸ was explicitly or implicitly rejected by the representatives of all these governments. The representative of Israel expressed the hope

that the Security Council will decide to reaffirm its 1951 resolution and will continue to oppose any interference with or discrimination against the ships or cargoes of any nation or flag, including Israel.

This the Council failed to do. In spite of all the brave words, no member of the Council introduced an appropriate draft resolution expressing the views of the majority and none was therefore voted upon. Instead the President of the Council summed up the sense of the discussion: On the one hand, "it is evident that most representatives here regard the resolution of 1 September 1951 as having continuing validity and effect, and that as in this context and that of the Constantinople Convention that they have considered the *Bat Galim* case"; on the other hand, "hope has been expressed that a continued attitude of conciliation on both sides will soon be leading to an agreement on the arrangements for the release of the ships and the cargo."¹⁴⁹

Thus, when faced with a clear test of its authority, the Security Council bowed to the *fait accompli* completely and without any reservation. It may well be that this was done in the certain knowledge of an impending Soviet veto. But this had never in the past nor has it ever in the succeeding

¹⁴⁴ *Ibid.*, p. 12, para. 69-70.

¹⁴⁵ "The Belgian delegation cannot but assume that this suggestion is inspired by a desire to bring about a settlement in conformity with the Constantinople Convention." *Ibid.*, 688th Meeting, Jan. 13, 1955, p. 4, para. 11.

¹⁴⁶ "May I say, quite frankly, that for Israel to set out deliberately to derange the Canal would be an act so patently against its own interests as to put the possibility beyond serious consideration. . . . There is no justification, therefore, for an Egyptian policy of exclusion against Israel ships desiring to pass through the Canal—a policy which we regard as entirely inconsistent with the intent of the 1951 resolution." *Ibid.*, p. 10, para. 46. For statements made by Peru, which endorsed the 1951 resolution, and Iran, which avoided the issue, see *ibid.*, p. 7, para. 27, and p. 8, para. 35-37.

¹⁴⁷ The Brazilian delegate said: "In any case we cannot accept a breach of the Constantinople Convention, any more than we can pass over in silence the fact that the Security Council resolution is being ignored." *Ibid.*, 687th Meeting, Jan. 4, 1955, p. 14, para. 81.

¹⁴⁸ *Ibid.*, 686th Meeting, Dec. 7, 1954, pp. 22 ff., para. 120-133.

¹⁴⁹ Official Records, 688th Meeting, Jan. 13, 1955, p. 16, para. 77.

¹⁵⁰ *Ibid.*, p. 20, para. 99-100.

ing years discouraged the Council from letting the Soviet Union shoulder the responsibility before the bar of public opinion, even when lesser issues were involved. Here there was open defiance of treaties and of a standing policy and decision of the Council formulated as early as August, 1949, when it placed the seal of its approval and construction upon the Egyptian-Israeli General Armistice Agreement. Here there was an issue which has been a primary cause of the chronic and endemic tension in the Middle East, and, as subsequent events were to show, a grave threat to international peace and security. Why, then, this unmitigated fiasco, why this shirking of the Council's "primary responsibility for the maintenance of international peace and security" and the taking of "prompt and effective action by the United Nations"? A possible explanation, it is ventured to suggest, may be found in the competitive wooing of the Arab States which set in with the first and second veto cast by the Soviet Union in order to shield its prospective clients in the Middle East. An exploration of the validity of this hypothesis lies, however, outside the compass of this paper.

VII. CONCLUSIONS

Several conclusions emerge from the preceding analysis. The Security Council is undoubtedly competent to deal with the issues arising from the Egyptian restrictions. Egypt has seen fit to challenge such competence when its point of view appeared certain not to be sustained by the Council. However, at the first stage of the dispute, Egypt freely admitted that

the General Armistice Agreement between Egypt and Israel took place under the auspices of the Security Council. The Council is therefore obviously the umpire in all matters relating to the armistice agreement. It is indeed obviously competent to deal with all matters relating to world peace and security.¹⁵¹

It is even arguable that the General Assembly would have competence under the Uniting for Peace Resolution of November 3, 1950,¹⁵² if the Council failed to exercise its primary responsibility for the maintenance of international peace and security, owing to lack of unanimity of the permanent members. The dangers to Middle East peace were often emphasized in the Council in connection with Egypt's restrictions.¹⁵³ Indeed, the General Assembly might well be better qualified to pronounce upon the larger issue arising from the continuation of Egypt's hostile and aggressive action.

Before taking up this larger aspect of the matter, it may be well to point out that it might be profitable for the Mixed Armistice Commission to take a fresh look at the Israeli complaints and to adjust its decidedly myopic construction of June 12, 1951, of the Armistice Agreement in the

¹⁵¹ Official Records, 514th Meeting, Oct. 20, 1950, p. 17.

¹⁵² General Assembly Resolution 377 A (V), Official Records, 5th Year, Supp. 20, pp. 10-12 (Doc. A/1775).

¹⁵³ See Official Records, 552nd Meeting, Aug. 16, 1951, p. 12, par. 56 (Brazil); *ibid.*, p. 10, par. 45 (U.S.A.); 553rd Meeting, Aug. 16, 1951, p. 3, par. 9 (Netherlands); 663rd Meeting, March 25, 1954, p. 8, par. 34 (France).

light of the specific findings and general tenor of the Security Council resolution of September 1, 1951. Several members made this point specifically with reference to the Gulf of Aqaba, but there is no reason why this should not be done also in relation to the Suez Canal. Thus the United States representative said:

We believe that the Mixed Armistice Commission, in considering a specific complaint with respect to actions in the Gulf of Aqaba, should be bound not only by the provisions of the General Armistice Agreement but should act also in the light of paragraph 5 of the resolution of 1 September 1951.¹⁵⁴

If the Commission has to consider the Israeli complaint regarding the Gulf of Aqaba in the light of the Security Council resolution, there is no reason for it to reconsider its earlier position regarding the Suez Canal in the same light. In so doing it might conceivably remove what has turned out to be a cause of persistent, albeit fruitless, misunderstanding on the part of Egypt and also lift the cloak which it unwittingly put on the true nature of Egyptian actions.

The Security Council, in considering the legal aspects of the Egyptian restrictions in general and of the seizure of the *Bat Galim* in particular, has chosen to rest its reasoning and conclusions on its own resolution concerning the truce in Palestine and the subsequent Armistice Agreement on the Armistice Agreement itself and other "international conventions in force," including the Convention of Constantinople of 1888. It has placed itself on solid ground. Even statements made more recently in connection with the Middle East crisis, in which the Israeli complaint against Egyptian restrictions and exclusions in the Suez Canal played an important part, proceeded from the same ground. Thus, in the view of the Secretary General of the United Nations:

It follows from the finding of the Security Council in 1951 that under such circumstances the parties to the Armistice Agreement may be considered as not entitled to claim any belligerent rights. Were the substantive clauses of the Armistice Agreement, especially articles VII and VIII, again to be implemented, the case against all acts of belligerency, which is based on the existence of the Armistice régime, would gain full cogency. With such a broader implementation of the Armistice Agreement, the parties should be asked to give assurance that, on the basis established, they will not assert any belligerent rights (including, of course, such rights in the Gulf of Aqaba and the Straits of Tiran).

As a conclusion from paragraphs 24-27, it may be held that, in a situation where the Armistice régime is partly operative by observance of the provisions of the Armistice Agreement concerning the armistice lines, possible claims to rights of belligerency would be at least so much in doubt that, having regard for the general international interest at stake, no such claim should be exercised in the Gulf of Aqaba and the Straits of Tiran. . . .¹⁵⁵

¹⁵⁴ *Ibid.*, 663rd Meeting, March 25, 1954, p. 2, par. 6. See also the British statement, *ibid.*, p. 6, par. 27, and the French statement, *ibid.*, p. 9, par. 39.

¹⁵⁵ Report by the Secretary General in pursuance of the resolution of the General Assembly of Jan. 15, 1957. U. N. Doc. A/3512, Jan. 24, 1957, p. 9, para. 27-28; 33 *United States State Bulletin* 278 (1957).

The solution of the apparent conflict between two principal organs of the United Nations, to wit, the Secretary General's view that the prohibition of belligerent rights is not unconditional and that in some way "the parties" may assert such rights,¹⁵⁶ and the view of the Security Council that Egypt is unconditionally prohibited from exercising belligerent rights by the Armistice Agreement as construed by the Acting Mediator, the Security Council itself, and the Mixed Armistice Commission, is of no immediate concern here. What is of direct interest is that this conflict indicates the insufficiency of the ground on which the issue of belligerency has so far been debated and on which the Security Council based its resolution of 1951.

Between Members of the United Nations, the first standard for determining the propriety of their conduct is not an armistice agreement, not even a peace treaty, but the Charter of the United Nations. In the conflict in Palestine, the hostilities, to be sure, were brought to a close by the truce ordered by the Council and by the Armistice Agreements concluded pursuant to a Council resolution. The decisive factor, however, was the admission of Israel to membership of the United Nations on May 11, 1949.¹⁵⁷ Without wishing to belittle the political and legal significance of the Armistice Agreements, particularly the Egyptian-Israeli Agreement of February 24, 1949, it is submitted that the admission of Israel to membership is of decisive significance for determining the issue of belligerent rights, whether in the Suez Canal, the Gulf of Aqaba or anywhere else in the air, on sea or land. Egypt asserts categorically: "A state of belligerence exists between Egypt and Israel."¹⁵⁸ It asserts equally that this state of belligerency has not been terminated by the Armistice Agreement, and consequently it is authorized to exercise the belligerent right of visit, search and seizure, although Israel is not authorized to exercise belligerent rights on land or in the air. The Security Council completely and in every respect rejected these pretensions, but it did so on the basis of the Armistice Agreement. The untenable character of the Egyptian assertion of a state of belligerency becomes even more obvious if it is examined in the light of the law of the Charter which is equally binding upon Egypt and Israel as Members of the Organization governed by that law. The question then can properly be formulated as follows: In the absence of authorization by the Security Council, are a state of belligerency between Members claimed unilaterally by one of them and the exercise of belligerent rights by one Member against another, compatible with the law of the Charter? ^{158a}

¹⁵⁶ See *e.g.* his statement: "Under these circumstances, it is indicated that whatever rights there may be in relation to the Gulf and Straits, such rights be exercised with restraint on all sides. Any possible claims of belligerent rights should take into account the international interests involved and, therefore, if asserted, should be limited to clearly non-controversial situations." *Ibid.*, p. 8, par. 25. Under the Armistice Agreement, what would be "clearly non-controversial situations" in which belligerent rights could be asserted?

¹⁵⁷ General Assembly Resolution 273 (III), Official Records, 3rd Sess., Pt. II, p. 18 (Doc. A/900).

¹⁵⁸ Official Records, 686th Meeting, Dec. 7, 1954, p. 21, par. 113.

^{158a} "The primary issue is not what rights Egypt could exercise as a belligerent under international law, but whether it could assume the status of a belligerent at all without thereby violating fundamental obligations of the United Nations Charter." *Lawyers'*

If the first submission is accepted, namely, that the relations between Egypt and Israel are governed by the law of the Charter,¹⁵⁰ then the conclusion seems inescapable that no rights can be asserted under an agreement which is in conflict with the law of the Charter. Article 103 of the Charter clearly establishes the supremacy of the law of the Charter over obligations under any other agreement.¹⁶⁰ It follows *a fortiori* that in case of a conflict between an asserted right under an agreement and obligations under the Charter, the latter must prevail. A treaty or agreement inconsistent with the Charter is null and void,

for such a treaty is an attempt to amend or abolish the Charter or parts of it in the relations of the Members, parties to this treaty. Such an effect, however, can be reached only by an amendment to the Charter the procedure of which is determined in Articles 108 and 109. In no other way can the obligations and rights of the Members stipulated by the Charter be changed or abolished.¹⁶¹

It follows, then, that rights and obligations claimed under the Armistice Agreement between Israel and Egypt which are in conflict with the Charter have been abrogated by it.¹⁶²

It hardly needs any argument to point out the incompatibility of the Egyptian claim to a unilateral state of belligerency with the purposes and principles of the Charter. In particular, it requires no prolonged discussion to find the execution by Egypt of belligerent rights, such as visit, search and seizure, and of acts such as interception of merchantmen, incompatible with Article 2, paragraph 4, of the Charter. The acts themselves have already been authoritatively determined as aggressive and hostile acts. Moreover, Article 2, paragraph 2, applies, for the Armistice Agreement concluded pursuant to a Security Council resolution constitutes obligations assumed by Egypt and Israel "in accordance with the present Charter," which must be fulfilled in good faith. Failure to do so constitutes not merely a violation of the Agreement but of a basic principle of the Charter and of international law. Under general international law repeated and serious breaches of an armistice agreement give the injured party the right of reopening hostilities.¹⁶³ If the Armistice Agreement of

Committee on Blockades: The United Nations and the Egyptian Blockade of the Suez Canal, p. 18 (New York, 1953). See also Rosenne, *op. cit.* 82 ff.

¹⁵⁰ The question of recognition of Israel by Egypt and the other Arab States is irrelevant with regard to rights and duties of membership. By Egypt's own admission legal relations—namely a state of war—exist between Egypt and Israel which are governed by international law.

¹⁶⁰ Art. 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

¹⁶¹ Hans Kelsen, *The Law of the United Nations* 113 (1951).

¹⁶² See also statements by the Israeli representative, Official Records, 516th Meeting, Oct. 30, 1950, p. 11, and 549th Meeting, July 26, 1951, p. 11; and statement by Peruvian delegate, 688th Meeting, Jan. 13, 1955, p. 7, par. 27.

¹⁶³ Stone, *Legal Controls of International Conflict* 644 (1954): "Certain rules seem to be established with regard to violations of armistice agreements. First, a serious breach, engaging the responsibility of the State which has committed it, gives the other belligerent state a right of withdrawal, if it so elects, and in urgent cases a right of reopening hostilities."

1949 is of the "classic" type, as Egypt argued so persistently, and if general international law, but not the Charter, governs the relations between Egypt and Israel, then the Israel intervention of October, 1956, could be regarded as a lawful exercise of rights derived from the state of belligerency, which Egypt never fails to invoke in support of its restrictions. But that has not been the position either of Egypt or of the United Nations in the face of the Israeli intervention.¹⁶⁴

In conclusion it is submitted that the time has come for the United Nations to face squarely the Egyptian claim that a state of belligerency exists with a fellow Member, and that in consequence it is entitled to exercise the belligerent right of visit, search and seizure of ships of fellow Members, and of intercepting ships of Israel, a fellow Member. In determining this basic claim, it is suggested, recourse should be had to the Charter of the United Nations rather than to the Armistice Agreement or to general international law. For what is illegal under the Charter cannot be made legal by the Armistice Agreement or general international law. In case of conflict, the higher law of the Charter must prevail juridically and consequently must be made to prevail politically and effectively. The organs of the United Nations, primarily the Security Council and the General Assembly, have an ample reservoir of power in the Charter for remedial action to remove a standing challenge to law and order, peace and justice in the Middle East.

¹⁶⁴ See Quincy Wright, "Intervention, 1956," 51 A.J.I.L. 257-277 (1957).

THE SUCCESSION OF THE INTERNATIONAL COURT OF JUSTICE TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE

BY MANLEY O. HUDSON

No international institution of general scope can continue its normal functioning in a period of a great world upheaval, and any international institution for the preservation of law and order must find its activities circumscribed at such a time. The Permanent Court of International Justice was no exception to the rule.

The Permanent Court of International Justice

The Permanent Court of International Justice existed under the Statute of December 16, 1920. The Statute, brought into force in the course of 1921, was amended on September 24, 1929; new texts were adopted for twenty-four articles, which entered into force on February 1, 1936. The judges of the Court, apart from elections to fill vacancies, were elected on September 14-16, 1921, and on September 25, 1930.

The Court functioned from January 30, 1922, to February 26, 1946. During this period it dealt with sixty cases. The record of these cases has been utilized in tracing the progress made by the Court.¹ The judges of the Court resigned on January 30, 1946, and the Court ceased to exist by virtue of a resolution of the Assembly of the League of Nations of April 18, 1946.

The position of the Permanent Court of International Justice was attested by reference to it in various international instruments. It was one of the two international institutions which survived, in some way, the League of Nations.

Preparations for the Succession

On November 2, 1942, the Executive Committee of the Governing Board of the Pan American Union published the preliminary recommendation of the Inter-American Juridical Committee, adopted on September 5, 1942.² This included the following:

The jurisdiction of the Permanent Court of International Justice should be extended, and procedure before the Court should be coordinated with that of regional judicial tribunals, if any should be created; the jurisdiction of these regional tribunals being determined by the place and the subject matter of the controversy.

In 1913, the Government of the United Kingdom suggested to various other governments the opportunity of establishing "an informal expert committee" to consider "the question of the Permanent Court of International Justice." It was understood that the governments would not be

¹ See the annual articles by Hudson in this JOURNAL, Vol. 17 onward.

² 38 A.J.I.L. Supp. 28-29 (1944).

bound by the report, and that the experts should act in their personal capacity and not in the name of their governments. The invitation was accepted by the governments of Belgium, Canada, Czechoslovakia, Greece, Luxembourg, The Netherlands, New Zealand, Norway, and Poland, and by the French National Committee.

This Inter-Allied Committee held nineteen meetings, from May 20, 1943, to February 10, 1944. It was under the Chairmanship of Sir William Malkin—a name very well known to all who are interested in the Court—and the Secretary was Mr. (now Sir) Gerald Fitzmaurice. The members of the Committee were: Prof. G. Kaeckenbeeck, Prof. D. M. Johnson, Mr. F. Havlicek, Prof. R. Cassin, Prof. A. Gros, Mr. C. Stavropoulos, Mr. G. Schommer, Mr. R. M. Campbell, Mr. E. Star-Busmann, Mr. Erik Colban, and Mr. E. Winiarski. Most of these men had long been identified with the progress of international organization, and their views carried weight in informed circles.

The Inter-Allied Committee based its work on the assumption that “an International Court in some form would be required in the future.” The Committee confined itself to broad views affecting the future of the Court. As a general matter, it said, “the Statute of the Court had worked well,” and it should be retained as a general structure of the future Court, and both the name and seat of the Court should be preserved.³

The discussion for some time led to the Dumbarton Oaks Proposals, framed at Dumbarton Oaks, August 21 to September 28, 1944, between the United States, Great Britain, and the U.S.S.R., and subsequently from September 29 to October 7, 1944, between the United States, Great Britain and China.⁴

The Dumbarton Oaks Proposals included, under Chapter VII, the provision that the following should be the guiding principles to be adopted with reference to the International Court of Justice:

1. There should be an International Court of Justice which should constitute the principal judicial organ of the Organization.
2. The Court should be constituted and should function in accordance with a Statute which should be annexed to and be a part of the Charter of the Organization.
3. The Statute of the Court of International Justice should be either (a) the Statute of the Permanent Court of International Justice, continued in force with such modifications as may seem desirable, or (b) a new Statute in the preparation of which the Statute of the Permanent Court of International Justice should be used as a basis.
4. All members of the Organization should *ipso facto* be parties to the Statute of the International Court of Justice.
5. Conditions under which States not members of the Organization may become parties to the Statute of the International Court of Justice should be determined in each case by the General Assembly upon recommendation of the Security Council.

³ The report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice of Feb. 10, 1944, is published in Brit. Parl. Papers, Misc. No. 2 (1944). It was republished in 39 A.J.I.L. Supp. 1-42 (1945).

⁴ *Ibid.* 46-56.

Under Chapter VIII, the Proposals suggested that the following paragraph be inserted:

6. Justiciable disputes should normally be referred to the International Court of Justice. The Security Council should be empowered to refer to the Court, for advice, legal questions connected with other disputes.

The United Nations Committee on the Court

It was understood that before the meeting of the United Nations Conference a Committee of Jurists should be set up to prepare a draft of the Statute of the Court. On March 24, 1945, the membership of the Committee of the Court was announced. The Government of the United States, which acted on its own behalf and that of the other governments represented at Dumbarton Oaks, issued invitations to the Committee.

The United Nations Committee on the Court met in Washington, from April 9 to April 19, 1945. It was attended by representatives of forty-four states. The President of the Committee was Mr. Green H. Hackworth (now a Judge of the Court), and Mr. Lawrence Preuss was made Secretary. The *Rapporteur* was Mr. Jules Basdevant.

The Committee proceeded to a revision, article by article, of the Statute of the Permanent Court of International Justice, making at the same time certain adaptations which were rendered necessary by the substitution of the United Nations for the League of Nations. It recalled "that the Permanent Court of International Justice had functioned for twenty years to the satisfaction of the litigants and that, if violence had suspended its activities, at least this institution had not failed in its task." It left the question open, however, being unable to reach a conclusion as to the future of the Permanent Court of International Justice.⁵

The United Nations Committee submitted alternative drafts of various questions. These included the method of renewing the Court's membership every three years, and the elimination of the assessors. It provided an alternative draft for compulsory jurisdiction. On the subject of advisory opinions, it proposed that the right to request the opinion should be given, not only to the Security Council, but also to the General Assembly. It proposed to fill an omission in the Statute of the Permanent Court of International Justice of a provision relating to amendments; to this end it proposed an Article 69 along the line of the Dumbarton Oaks Proposal.

The United Nations Conference on International Organization

The United Nations Conference on International Organization began at San Francisco on April 25, 1945, with fifty states represented. The judicial organization was entrusted to Committee IV (1). This Committee met on May 4, 1945, in the first of twenty-two sessions. Mr. Manuel Gallagher (Peru) was Chairman of the Committee, and Mr. Nasrat Al-

⁵ The International Court of Justice, Selected Documents relating to the Drafting of the Statute (Washington, D. C.: Government Printing Office, 1946).

Farsy (Iraq) was *Rapporteur*. The Permanent Court of International Justice was represented by its President, Mr. J. G. Guerrero, and Judge Hudson. A Statute was adopted which contained Article 70, but otherwise it was the Statute of the Court as adopted on June 26, 1945.⁶

The Committee began by paying its tribute to the work of the Permanent Court of International Justice. As a simpler and more practical course to adopt, a Sub-Committee of the Committee decided on May 21, 1945, to propose the creation of a new Court. This was the first time that the new Court was envisaged. The Committee's consideration of the question was summed up by its Reporter in the following language, adopted by the Committee:

The basic question which had to be resolved by the First Committee was whether the Permanent Court of International Justice should be continued as an organ of the new Organization, or whether a new Court should be established. This question was considered in all its aspects, both at meetings of the full Committee and at a number of meetings of a subcommittee. After balancing the advantages to be gained and the objections to be overcome in the adoption of either course, the First Committee decided to recommend the establishment of a new Court. This course commended itself to the First Committee as more in keeping with the provisions proposed for inclusion in the Charter, under which all members of the Organization will *ipso facto* be parties to the Statute and other states not members of the Organization may become parties to the Statute only on conditions to be laid down in each case by the General Assembly upon the recommendation of the Security Council. Some of the members of the First Committee regarded the maintenance of these provisions as essential to the acceptability of the Charter and the Statute by all members of the United Nations.

Moreover, the creation of a new Court seems to be the simpler and at the same time the more expeditious course to be taken. If the Permanent Court were continued, modifications in its Statute would be required as a result of the discontinuance of the League of Nations. Only 32 of the 41 states now parties to that Statute are represented at the United Nations Conference in San Francisco, and the negotiations with the parties not thus represented which would be required for effecting modifications in the 1920 Statute would encounter difficulties and might be very protracted. Moreover, a large number of states are represented at the United Nations Conference which are not parties to the 1920 Statute, and as it is not open to all of them for accession, some of them could have no part in the negotiations entailed by the process of modification. On the whole, therefore, though the creation of a new Court will involve important problems, this course seems to the First Committee to create fewer difficulties than would the continuance of the Permanent Court of International Justice, and it may make possible the earlier functioning of the Court of the future.

It was possible for the Reporter to say that the new Court would not be exclusively an organ of the United Nations. He made the following statement with reference to the creation of the new Court:

⁶ The text of this Statute is found in the International Court of Justice, Selected Documents relating to the Drafting of the Statute, pp. 151-164 (cited above).

The creation of the new Court will not break the chain of continuity with the past. Not only will the Statute of the new Court be based upon the Statute of the old Court, but this fact will be expressly set down in the Charter. In general, the new Court will have the same organization as the old, and the provisions concerning its jurisdiction will follow very closely those in the old Statute. Some of the features of the old Statute were elaborated from ideas which had already been current during several decades, and its provisions with reference to procedure—which it is now proposed to retain—were to a large extent borrowed from the Hague Conventions on Peace Settlement of 1899 and 1907. In a similar way, the 1945 Statute will garner what has come down from the past. To make possible the use of precedents under the old Statute the same numbering of the articles has been followed in the new Statute.

In a sense, therefore, the new Court may be looked upon as the successor to the old Court which is replaced. The succession will be explicitly contemplated in some of the provisions of the new Statute notably in Article 36, paragraph 4, and Article 37. Hence, continuity in the progressive development of the judicial process will be amply safeguarded.

The provisions of the Statute, as a whole, make little departure from those in the Statute of the Permanent Court of International Justice. Among the more important changes was one providing for the election of five judges at intervals of three years by the General Assembly and the Security Council. The Court is to form chambers for dealing with particular cases, instead of the provisions in Articles 26 and 27 of the Statute of the Permanent Court. Articles 69 and 70 are quite new; in fact Article 70 does not seem to have been considered by the United Nations Committee IV (1).

This Court—the International Court of Justice—became an organ of the United Nations as a result of Article 92 of its Charter, and in Article 93 all Members of the United Nations are *ipso facto* parties to the Statute of the Court of Justice. The Charter of the United Nations, together with the annexed Statute of the International Court of Justice, first entered into force on October 24, 1945.

THE NAMES AND SCOPE OF TREATIES

BY DENYS P. MYERS

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All writers commencing with Grotius say that the names of instruments embraced in the genus *treaty* have little, if any, legal significance. All who mention the matter say that some instruments are more important in international relations than others, and that "treaty" or "convention" is at the top of the list of some three dozen words that are used to describe such instruments. All agree that treaties generically have the characteristic of legally recording what the parties have agreed to, and, beyond that, all hedge on completing a definition. Few writers attempt to draw a line between treaties and legal obligations that are not treaties. In one way or another writers are accustomed to say that names are assigned to treaties idiosyncratically, at the whim of the draftsmen or by chance.¹

The uncertainties expressed by the writers concern them more than the foreign offices, which seem not to have any compelling desire for defining the names in a code of treaty law. Bearing in mind that words and phrases are not without legal significance, it may be clarifying to examine what names are given to the instruments generically called treaties and to speculate on what legal obligations are not treaties.

A treaty has definite attributes which are generally recognized. Sir Gerald G. Fitzmaurice, the third rapporteur on the Law of Treaties for the United Nations International Law Commission, embodies these legal elements in his code definition:²

¹ The three Reports of the U.N. International Law Commission on the Law of Treaties are typical. James L. Brierly (Doc. A/CN.4/23) speaks of the infelicity of "the extreme variety of modern nomenclature." Sir Hersch Lauterpacht (Doc. A/CN.4/63, p. 47) says that "in most cases there is no apparent reason for the variation in the terms used." Sir Gerald G. Fitzmaurice (Doc. A/CN.4/101, p. 43) says "the designation is irrelevant."

In their report to the League of Nations Committee of Experts for the Progressive Codification of International Law, A. Mastny and Simon Rundstein wrote:

"In practice, little attention is paid to the exact meaning which should be given to terms customarily used.

"The choice of nomenclature and form is governed by arbitrary considerations and depends upon the nature of the relations between States, the customs of the respective chancelleries and sometimes even the carelessness of those who draft diplomatic instruments." 20 A.J.I.L. Spec. Supp. 215 (1926).

² The Fitzmaurice draft of March 14, 1956 (Doc. A/CN.4/101) is cast in the form of a code, more detailed than the two preceding reports. Sir Hersch Lauterpacht's 1953 and 1954 reports (Docs. A/CN.4/63 and 87) and the late James L. Brierly's 1950 and 1951 reports (Docs. A/CN.4/23 and 43), which were discussed at the 84th to 88th meet-

Article 2 (1) . . . a treaty is an international agreement embodied in a single³ formal⁴ instrument (whatever its name, title or designation) made between entities⁵ both or all of which are subject of international law possessed of international personality and treaty-making capacity,⁶ and intended to create rights and obligations, or to establish relationships, governed by international law.

There seems to be no quarrel over the legal attributes of the genus *treaty*, whatever its name, title or designation." It appears that the species of the genus would reflect in their titles their political origin, that is, who they were made in the name of the state as such, the head of state, government, a department of government, a minister or his agent.⁷

NAMES OF THE GENUS TREATY AND THEIR USAGE

The following tabulation of over 5,000 items shows the frequency of use of the various terms given by states and international organizations to those documents known generically as treaties which establish, or purport to establish, binding legal rights, obligations and relationships between the participating entities. Except as indicated, bilateral, plurilateral (a limited number of parties) and multilateral instruments are not distinguished.

ings of the Commission and emerged in 1951 as a provisional text (Doc. A/CN.4/L.283), embody the same attributes differently expressed. The 1956 draft is very like Art. 1 of the Harvard Research Law of Treaties, 29 A.J.I.L. Supp. 657, 686-698 (1935).

³ However, Art. 2 (2) specifies that such an agreement "intended to serve the same purpose . . . may be embodied . . . in more than one instrument, such as an exchange of notes, letters or memoranda." Lauterpacht and Brierly agree, but the Harvard Research did not include exchanges of notes because they did not conform to its procedural rules.

⁴ "Formal" signifies a written instrument. Art. 1 (1) of the code excludes "agreements not in written form, the validity of which is not, however, on that account to be regarded as prejudiced." Lauterpacht and the Harvard Research tend to regard them as treaties.

⁵ "Entities" includes states as defined in Art. 3 to comprise governments acting through another state and international organizations covered by the I.C.J. judgment in the Injuries to United Nations Servants Case, 1949 I.C.J. Rep. 174, 178-180. Previous drafts were in agreement.

⁶ Art. 9 (1) provides: "Treaty-making and all other acts connected with treaties are, on the international plane, executive acts, and the function of the executive authority." The international organization exercises these powers as decided upon by its competent organs acting within the constitutional limits of their functions. Previous drafts accept this attribute implicitly, rather than explicitly.

⁷ None of these representatives of the state can negotiate, sign or otherwise participate in making a treaty without executive powers. The exchange of "full powers, found in good and due form," is noted in treaties, conventions and some agreements, but the existence of "powers" is not disproved because growing informality fails to record them. Ministers of foreign affairs possess the powers *ex officio*, ambassadors and ministers can make many instruments by virtue of their general powers and credentials, supplemented by instructions. Other agents are given powers *ad hoc* in case of need. Proper powers and authority to bring a treaty into force are factors in what Fitzmaurice calls conditions of formal validity. Report, Doc. A/CN.4/101, Art. 10, 11.

USAGE OF TREATY NAMES

	<i>Multilateral</i> ⁸		<i>United States</i> ⁹		<i>United Nations Treaty Series</i> ¹⁰	
	<i>1864-1914</i>	<i>1920-1945</i>	<i>1778-1909</i>	<i>1950-1952</i>	<i>Registered</i>	<i>Filed, Recorded</i>
Treaty	36	42	142	2	68	21
Pact	1	5	—	—	—	1
Constitution	—	3	—	—	5	—
Charter	—	5	—	1	2	—
Convention	150	353	226	17	176	22
Agreement ¹¹	60	224	66	374 ¹²	1001	199
Exchange of notes	—	—	7	—	585	208
Memoranda of agt.	—	—	—	—	16	6
Protocol ¹³	43	290	67	23	68	16
Act, final, general	22	12	2	—	8	—
Declaration	28	48	17	—	47	1
Notes verbales	—	—	—	—	11	—
Arrangement	1	56	4	4	7	2
Accord	—	1	—	1	1	—
Additional articles	3	2	19	—	—	—
Aide-mémoire	—	—	—	—	1	—
Code	—	1	—	—	—	—
Communiqué	—	—	—	—	1	—
Compact	—	—	1	—	—	—
Contract	—	—	2	—	—	1
Instrument	—	2	—	—	2	—
Lease	—	—	1	—	—	—
Mandates	—	15	—	—	—	—
Measures	—	1	—	—	—	—
Minutes, agreed	—	1	—	—	3	—
Modification	—	—	1	—	—	—
Modus vivendi	1	—	7	1	1	1
Optional clause	—	1	—	—	—	—
Plan	—	3	—	—	—	—
Procès-verbal	—	12	—	—	—	1
Provisions	—	20	—	—	—	—
Recommendation	—	1	—	—	1	—
Resolution	—	1	—	—	—	—
Regulations ¹⁴	7	100	4	5	1	—
Rules	2	18	2	—	—	—
Scheme	—	2	—	—	—	—
Statute	1	27	—	—	1	—
Understandings	—	—	3	—	—	—
Undertakings	—	1	—	—	—	—

⁸ Summarized from Manley O. Hudson, *International Legislation, 1864-1914*, from the list, Vol. 1, xix-xxxvi; 1920-45, from the contents titles. Subsidiary documents are included in the analysis.

⁹ The 1778-1909 record analyzes the bilateral contents of William M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers*. The 1950-52 record analyzes the contents of the five parts of the first three volumes of *United States Treaties and Other International Agreements* (hereafter cited as *U. S. Treaties*) in order to show the character of a state's current activity, though almost all items were also registered for the *United Nations Treaty Series* (hereafter cited as *U.N. Treaty Series*).

¹⁰ The analysis covers 151 volumes, deposits through 1952, or 2484 items, of which 2005 were registered and 479 filed and recorded. Only principal documents have been

Statistically it appears from the tabulation of 5079 items that 4512 or 89%, were entitled in official prints as treaties, conventions, agreements, exchanges of notes or protocols, with certain casual equivalents. Of the other titles, four—act, arrangement, declaration and regulations—account for 409 items, or 8%. Most of the remaining titles were used for subordinate parts of multilateral instruments.

It is now intended to comment on the names given to various instruments of the genus *treaty* with a view to showing that there is much consistency in their usage. As definitions there is little new to offer; but from consideration of the executive level at which instruments of different types are negotiated, their relation to the polity and treaty structure of the states concerned, and the specific purpose of particular instruments, it is believed that a reasonably clear pattern of treaty nomenclature will appear.¹⁵ In general all forms manifest the legally stabilized portion of the relations between states. It is to be noted that the historical or political "importance" of an instrument is not necessarily reflected either in its form or its name.¹⁶

The names here discussed are those in current use. Historically some names have become obsolete from political evolution. Jean Dumont, in the title of *Corps universel diplomatique du Droit des gens*, which contains documents from the year 800 to 1730, lists treaties, conventions, truces

brought to record. These statistics do not take account of protocols printed with the master paper, secondary exchanges of notes assembled under a single registration number, or other instruments which, though divisible as obligations, are handled as one unit. The General Agreement on Tariffs and Trade (55-64, 142-146 U.N. Treaty Series), for instance, is treated as a single item.

Agreement is the protean word in treaty nomenclature. Titles have been accepted as printed, though it is obvious that many of the names infrequently used may be preceded or followed by the term agreement, which strictly identifies a single document.

¹⁵ The United States titles its documents "agreement effected by exchange of notes," while the United Nations Secretariat reverses the words as "exchange of notes constituting an agreement." Many United States "agreements" are thus registered as exchanges of notes.

¹⁶ Protocols to multilateral instruments are shown in the first two columns, but not in the U.N. Treaty Series unless they were separately entered.

¹⁷ Regulations and rules adopted by the Universal Postal Union, the International Telecommunication Union and such bodies are not separately recorded in the U.N. Treaty Series statistics.

¹⁸ Most treatises on international law touch on treaty nomenclature. Extensive consideration to it is given in Sir Ernest Satow, *Guide to Diplomatic Practice* (3d ed., 1932), Ch. 28; Raoul Genet, *Traité de diplomatie et de droit diplomatique*, secs. 1374-1534 (1932); Harvard Research in International Law, *Law of Treaties*, Art. 4, comments 29 A.J.I.L. Supp. 710-722 (1935).

¹⁹ The funding agreements of 1923-28 were negotiated by the World War Foreign Debt Commission, signed by the Secretary of the Treasury and approved as Acts of Congress (44 Stat. 1325; 44 Stat. 329, 376, 385; 45 Stat. 399, 1176; 46 Stat. 48), full powers being issued to the Secretary of the Treasury, the transactions otherwise being of an interdepartmental nature between governments. The Declaration by United Nations, Jan. 1, 1942, the alliance of the second World War, was an executive agreement of the President as far as the United States was concerned, Executive Agreement Series, No. 236 (hereafter cited as Exec. Agr. Ser.).

actions, pacts, concordats,¹⁷ contracts, capitulations, awards, declarations (of war), royal marriage contracts, donations, renunciations, protests, feudal investitures, "erections" of dignities and trading companies (charters).

The broad division of instruments into treaties and agreements in Article 102 of the United Nations Charter is valid in the sense that one category emanates from the highest executive authority in the state and the other from subordinate executive authority, the one laying down the general and substantial relations between states and the other handling the ordinary intergovernmental business. The line between the two categories can only be subjectively drawn, and the system of treaty relations tends to expand at the ends. Growing integration of the international system has brought into being instruments which transcend the bilateral treaty, and such names as act, pact, charter, constitution, covenant, statute, have been introduced to describe plurilateral or multilateral attempts to over-reach the ordinary limits of the treaty. At the other end of the scale the standard names—agreement, arrangement, protocol, declaration, exchange of notes—have been supplemented by a varied list of instruments derived from diplomatic parlance and the practice of international conference procedure. In both cases French and English synonyms may be used at will.

Convention has become the standard name of instruments produced by multilateral bodies, which in particular instances study specific phases of a general subject.¹⁸

In addition to the two broad divisions of the genus *treaty*, considerations of state structure and the relation of a transaction to the treaty system of the parties play a part in nomenclature. For the postwar settlement of Franco-American accounts, a preliminary agreement, an exchange of notes on armed force supply and an agreement on supply to France were concluded February 28, 1945,¹⁹ between the United States and the Free French régime. After the Vichy régime collapsed, a more complete settlement was made on May 28, 1946, when there was still only a provisional government in France.²⁰ It was covered by a declaration of the President of the United States and the President of the Provisional Government of France with respect to economic and financial problems of common interest, in order to make the settlement applicable when France was reconstituted. The detailed settlement consisted of eight papers in addition to the declaration by the Presidents; much of the data was tentative or dealt with continuing situations. The impossibility of being fully precise was reflected in the titling of the papers constituting the agreement: memorandum of

¹⁷ Concordats between the Holy See and Roman Catholic states are not discussed here; Yves M.L. de la Brière, "Le Droit concordataire dans la nouvelle Europe," 63 *Hague Academy Recueil des Cours* 371 (1938).

¹⁸ Mandates were especially named as instruments under Art. 22 of the Covenant of the League of Nations.

¹⁹ 76 U.N. Treaty Series 193-237; Exec. Agr. Ser., No. 455.

²⁰ 84 U.N. Treaty Series 59-199; *Treaties and Other International Acts Series* (hereafter cited as T.I.A.S.), No. 1928.

understanding; agreement on surplus, and understanding; agreed statement by Combined War Settlement Commission on claims; memorandum constituting an agreement on shipping; memorandum and memorandum announcement on troop pay and procurement; memorandum of agreement on expenditures of armed forces; declaration constituting an agreement on commercial policy; understanding on the exhibition of motion pictures. The several agencies concerned had come to their conclusions in their own way and the Department of State put the pieces together in one package of 87 pages. This variation of form contrasts with the parallel settlement between the United States and the United Kingdom, which had a stable government throughout the period. Those two governments fixed their policy December 6, 1945, in a joint statement, and on March 27, 1946, through their regular negotiating channels signed a memorandum covering nine agreements dealing with as many phases of the settlement.²

The Treaty Group

Treaty (*traité, Vertrag*) is the most formal instrument of the genus used to record comprehensive inter-state agreement upon fundamental relations or status. Jean Barbeyrac²² in 1739 listed sixty subjects of treaties, some of which are obsolete. Most of them, by reason of developed formulas, are still in use in consolidated form. Basic relations between states on matters of politics, intercourse, co-operation and establishment are initially defined by treaties of peace, friendship, commerce, navigation, alliance, defense, population and territory. The treaty *eo nomine* is less used than formerly because the increased amount of negotiation necessitated by the volume and complexity of relations, the amount of routine business, and changes in governmental character have multiplied other more convenient and speedy forms. In addition to "treaty," comparable fundamental instruments of multilateral character are given a variety of names, sometimes with a view to imparting a transcendental aspect to the document.

The treaty as the fullest form consists of the *narratio* (preamble), *dispositio* (body) and *corroboratio* (final clauses). When royalty was in flower treaties were made in the name of the heads of state and the rights and obligations they set forth were attributed to the rulers. They may now be made in the name of the titular or executive heads of state but more usually in the name of the governments, with a tendency to prefer only the full name of the state (United States of America, etc.).²³

²² 4 U.N. Treaty Series 2-99.

²³ Histoire des anciens traitez, pp. xi-xii. The word "treaty" was used in the Rolls of Parliament as early as 1427. It described the negotiations rather than the final document. The inconclusive negotiations of Parliament with Charles I in 1628, a few months before his execution, are known as the "treaty of Newport."

²⁴ The differences are without significance, simply reflecting current organization of the state. The Treaty of Westphalia between Spain and The Netherlands, Münster, Jan. 30, 1648, was concluded between the "king of Spain and the States General of the United Provinces." The Final Act of the Congress of Vienna, June 9, 1815, was

Treaties are negotiated by plenipotentiaries, whose names are set forth in the preamble with a statement that their full powers have been found in good and due form; the treaty is signed subject to executive confirmation. The preamble as a rule states reasons why they agree to the articles.

The substantive articles of treaties vary greatly and record all degrees of agreement upon the particular matters with which they deal. Negotiated language requires careful examination. Parties may agree, declare, undertake, recognize abstract or concrete propositions in a treaty, and may do these jointly, reciprocally or unilaterally. These nuances are not confined to the treaty, but are more likely to be numerous in this form of instrument because of its scope and perhaps its elusive subject matter.

The treaty usually requires ratification, and clauses providing for the details of that procedure and of the treaty's duration are in it. Provisions for handling disputes arising from the text, accession, modification and other clauses designed to afford means of effective management are frequently added in modern times. The treaty ends with a *testimonium* clause and the signatures are ordinarily sealed. The foregoing provisions are called the *corroboratio*.

Pact, Constitution, Charter. While "treaty" remains the highest name in the system, fashion has invented substitutes. From 1815 to 1890 the "Concert of Europe" produced both "acts" and "treaties" in conferences, intending them to be treaty laws. Woodrow Wilson gave the name "Covenant," derived from Scottish history,²⁴ to the constitutive document of the League of Nations, and the French turned it as *Pacte*.

Pact was not a new word in statecraft,²⁵ but it acquired both literary and technical overtones and became a popular synonym for treaty. Raoul Genet not ineptly says that it implies sentiments beyond those of inter-state diplomatic custom.²⁶ It has a wide currency because of its shortness, a

in the name of "the Powers" which signed the Treaty of Paris, May 30, 1814. The Treaty of Peace with Germany, Versailles, June 28, 1919, was in the name of the states only, designated as "Powers." The Treaty for Renunciation of War, Paris, April 27, 1928, was in the name of heads of state, including the Emperor of Japan; the renunciation was "in the name of the respective peoples," which required a reservational explanation to uphold the Emperor's prerogative. A somewhat similar difficulty occurred at San Francisco, where the preamble of the Charter began: "We, the peoples of the United Nations." On the insistence of The Netherlands, whose Queen as head of state was the contractant, the enacting clause was completed: "Accordingly, our respective Governments . . . have agreed . . ." These fashions change with the times. The Imperial Conference of 1926 recommended that "all treaties . . . should be made in the name of Heads of States" and "in the name of the king as the symbol of the special relationship," if members of the British Commonwealth were parties; but political evolution leaves only the second condition pertinent in the present Commonwealth.

²⁴ The Solemn League and Covenant of 1643 is the reputed source of the word. However, the old Testament covenants (Exodus 24:7, Deuteronomy 29:1 and Joshua 24:25) are suggestive prototypes.

²⁵ In Grotian Latin it meant agreement.

²⁶ *Traité de diplomatie*, Vol. III, p. 523: "Le pacte baigne dans un océan de sentiments supraterrrestres résolument placés au dessus des habitudes diplomatiques inter-

single syllable, tempting for a headline writer or a scholar to use for the result is that half the time "pact" is not the real name of the document discussed. An early instance of its use was the Pacte de Famille, August 15, 1761,²⁷ relating to the royal families of France and Spain. It was confused with the "Act" of the Holy Alliance, September 14, 1815, an instrument untitled, but indexed as a treaty.²⁸ It was responsibly adopted as a collective name for the seven Locarno documents initialed October 16, 1925, which as the "Rhine Pact" raised great expectations.²⁹ At the next ten years or so there was a rash of pacts of cordial collaboration, friendship, entente, non-aggression and pacific settlement, some encountered by the conclusion of the Treaty for the Renunciation of War, August 26, 1928, which was called "Pact of Paris" or "Briand-Kellogg Pact." Most of them have fallen into desuetude, but the use of the term for a much valued treaty persists. The Pact of the League of Arab States, March 22, 1945, was filed in 1950 by Egypt.³¹

Part I of the treaties of the Paris Peace Conference was entitled "Covenant of the League of Nations," but Part XIII of the treaty with Germany was entitled "Labour." After ratification of the treaties had parts existed separately, and the International Labor Organization named its fundamental document "Constitution," following the practice of national states. The Organization has maintained the name, and the states which have set up treaties establishing several other specialized agencies of the United Nations system have used the same word—the Food and Agriculture, United Nations Educational, Scientific and Cultural, World Health, and International Refugee, Organizations.³²

Charter as the name of the constituent treaty of the United Nations Organization originated in the Department of State with a research staff group which was assigned the task of drafting a text to embody the principles developed by the studies made up to August, 1943.³³ The group received their draft in the historical sense, of which Magna Charta is an example, as a grant of authority to the organization from the peoples

étatiques et appartenant par leur transcendance voulue ou espérée, au premier des philosophes."

²⁷ De Clercq, *Recueil des Traités de la France*, Vol. 1, p. 81.

²⁸ Fedor F. Martens, *Recueil des Traités de la Russie*, Vol. IV, p. 1; 3 *British Foreign State Papers* (hereafter cited as *Brit. and For. State Papers*), p. 211. The text calls the instrument an "act."

²⁹ 54 *League of Nations Treaty Series* (hereafter cited as *L. N. Treaty Series*) 22. The whole transaction consisted of a final act, a letter to Germany, a treaty of guarantee, two treaties and two conventions.

³⁰ For such pacts, some of which are based on the "Pact of Paris," see 26 *League of Nations Treaty Series* 22; 60 *ibid.* 19; 67 *ibid.* 394; 78 *ibid.* 414; 108 *ibid.* 188, 230; 139 *ibid.* 223; 153 *ibid.* 153; 156 *ibid.* 165. The Treaty for Renunciation of War, force July 24, 1929, is cited as the "Pact of Paris" in various League resolutions; it is printed at 94 *ibid.* 57.

³¹ 70 *U.N. Treaty Series* 237.

³² Also Constitution of the International Rice Commission, 120 *ibid.* 13.

³³ *Postwar Foreign Policy Preparation, 1939-1945*, pp. 176, 526 (*State Dept. Pub.* 3580).

represented by the governments which would institute it. The name was adopted in the Dumbarton Oaks Proposals without question, though its significance was discussed to help the Soviet Delegation render it *ustav* instead of *statut*, which was their first translation. At San Francisco the underlying idea was emphasized by putting the preamble in the name of "We the peoples of the United Nations" for whom their governments agreed to the Charter.³⁴ The Organization of American States is set up by a Charter.³⁵ The word has been used internationally for treaties establishing a body to perform business or administrative functions³⁶ reflective of municipal practice. The Atlantic Charter of August 14, 1941, was a treaty only by incorporation.³⁷

Statute has come into international usage from parliamentary practice. It designates a basic act which regulates an institution or specific régime or subject. The idea seems to have been first used in the "Public Act" of the European Commission of the Danube, November 2, 1865,³⁸ which evolved into the Convention and Definitive Statute of the Danube, July 23, 1921.³⁹ However, vogue was given to the concept by the Assembly of the League of Nations, which adopted the Statute of the Permanent Court of International Justice on December 13, 1920, a constituent document covered for ratification by a protocol of signature. The League of Nations used the term frequently to name provisions regarded as stable law, enacted by covering conventions,⁴⁰ and also to set up institutions under its auspices.⁴¹ States adopted the term for some purposes, such as Memel

³⁴ Sieur Du Cange, *Glossarium mediae et infimae Latinitatis* (1657), in addition to defining *charta* as a grant from highest authority, adds that it enables the grantee to demonstrate his legal right thereto.

³⁵ 119 U.N. Treaty Series 3.

³⁶ For instance, the Charter of the International Agricultural Mortgage Company, May 21, 1931, 5 Hudson, International Legislation 973; and the Charter of the Allied High Commission for Germany, June 20, 1949, 122 U.N. Treaty Series 3. The Charter of the International Trade Organization is not in force. Charters (Fr., *statuts*) defined the functions of the International Military Tribunals for Germany and the Far East (Exec. Agr. Ser., No. 472; Far Eastern Series, No. 12; 82 U.N. Treaty Series 284). The Pacific Charter, Sept. 8, 1954 (T.I.A.S., No. 3171) is a Southeast Asia defense document.

³⁷ As an annex to the Declaration by United Nations, Jan. 1, 1942, 204 U.N. Treaty Series 381. It so appears in Exec. Agr. Ser., No. 236, but the Declaration was a response to the Axis Pact of Assistance, Sept. 27, 1940, which was also annexed to the Declaration by the United Kingdom in its registration with the League of Nations.

³⁸ 55 Brit. and For. State Papers 93.

³⁹ 26 L.N. Treaty Series 173.

⁴⁰ Statutes on the régime of navigable waterways of international concern, 7 L.N. Treaty Series 35; on the international régime of railways, 47 *ibid.* 55; on an international mortgage credit company, 1931 Official Journal 1428; establishing an International Relief Union, 135 L.N. Treaty Series 247. A modification of the practice, where national legislation was required, was to annex a "uniform law" to a convention, as in the case of bills of exchange, promissory notes and checks, 143 *ibid.* 257, 335.

⁴¹ Organic statutes established the Organization for Communications and Transit, the International Institute of Intellectual Co-operation, the International Institute for the Unification of Private Law, the International Educational Cinematographic Institute, the International Center for Leprosy Research, and the Nansen International Refugees Office. Denys P. Myers, *Handbook of the League of Nations* 57, 66-68, 71 (1935).

Territory,⁴² and machinery for combating contagious diseases of animals and the locust pest.⁴³

Convention (*convention*, *Vereinbarung*) has the form and technical characteristics of a treaty, from which it is distinguished by its content. A convention does not deal with questions of high policy between two parties, and the subjects with which it does deal do not require comprehensive treatment of a field of relations. One will invariably have a treaty of commerce covering the general field and a consular convention treating a special aspect of that type of intercourse. The distinction is sometimes slight, and was bridged in the case of the General Convention of Peace, Amity, Navigation and Commerce between the United States and Colombia, October 3, 1824, which is called a "treaty or general convention" in the preamble.⁴⁴ Put in another way, conventions are not used to establish rights and obligations in a fundamental field of inter-state relations, but are used to define or expand aspects of a field.⁴⁵

The usage is clearer with multilateral than with bilateral forms. The great bulk of agreements reached under the auspices of international organizations is in the form of conventions which deal specifically with restricted phases of questions deemed ripe for handling.

The adjective "conventional"⁴⁶ is a generic form and is applied to treaties however named.

Act has become associated with treaty nomenclature for many years. A "general act" consistently and a "final act" often is a treaty, and there is a use of the word which indicates that an instrument is credited with treaty effect without strictly conforming to treaty characteristics.

This third usage testifies that the instrument is an authentic and legally binding act of state assimilated to treaty status, if it is not a treaty *stricto sensu*. Such acts, and the legal obligations with other states which they

⁴² 29 L.N. Treaty Series 95.

⁴³ 2 Hudson, International Legislation 1242, 1891. The statutes of the Council of Europe, May 5, 1949, and of the Hague Conference on Private International Law, Oct. 31, 1951 (87 U.N. Treaty Series 103 and reg. No. 2997), are postwar examples of use of the word.

⁴⁴ 2 Hunter Miller, *Treaties and Other International Acts of the United States* 183, 188, who correctly rules that it is a treaty "in the strictest sense of the word." The use of both terms seems to have been due to uncertainty as to what extent the Treaty of Friendship, Boundaries, Commerce and Navigation of Oct. 27, 1795, with Spain applied in succession to the newly independent states of South America. "Treaty" implied it did not; "general convention" implied it might and that this instrument might complement existing rights and obligations. The same language was used in treaties with the Central American Federation, Dec. 5, 1825; Brazil, Dec. 12, 1828; Chile, May 16, 1832; and Peru-Bolivian Confederation, Nov. 30, 1836, 3 *ibid.* 209, 451, 671, and 4 *ibid.* 71. Venezuela was included in the Republic of Colombia in 1824, but after it was separately recognized in 1835 signed the same text with the United States under the name of treaty on Jan. 20, 1836, 4 *ibid.* 3.

⁴⁵ Carlos Calvo says a convention is an engagement "applying to a single clearly determined object." *Le Droit International théorique et pratique*, Vol. I, p. 689 (2d ed. 1870).

⁴⁶ English usage avoids applying the nomenclature of municipal law contracts to the treaty structure.

may establish, are at times difficult to distinguish from treaty obligations. In national compilations of treaties the term "international acts" appeared on the title page of volumes prepared for the United States Senate in 1910⁴⁷ in order to describe in the title certain inclusions peculiar to American practice. One of these was correspondence on the "Open Door" in China, which might be called a concurrent series of exchanges of notes, and another was a series of copyright proclamations.⁴⁸ In 1931 the Department of State began publishing the historical volumes of David Hunter Miller, a most able legal scholar, under the title *Treaties and Other International Acts of the United States of America*, the acts being those which "have an international character." Of the 240 "documents" published in the eight volumes issued, many are not in the ordinary forms of the genus *treaty*. When the Department of State consolidated the *Treaty Series* and the *Executive Agreement Series*⁴⁹ in 1946, it avoided the controversy over the meaning of "executive agreement" by naming the result *Treaties and Other International Acts Series*, although since 1950 the pamphlets have been compiled in the volumes entitled *United States Treaties and Other International Agreements*.

The Algeciras Conference on Morocco drew up three declarations, two regulations and a bank concession act and "united them in a general act" of April 7, 1906.⁵⁰

The American republics on two occasions have used "acts" to assert policy in advance of events. The Act of Habana, July 30, 1940, concerning the provisional administration of European colonies and possessions was intended to make clear their position if Germany attempted to take French or other possessions before a convention of the same date could be ratified.⁵¹ The Act of Chapultepec,⁵² March 8, 1945, was drawn up by the Inter-American Conference on Problems of War and Peace in the form of an agreement regarding reciprocal assistance and solidarity as a means of unifying their position at the forthcoming United Nations Conference on International Organization, where its purport bore on the substance of Articles 51-54 of the Charter.

⁴⁷ *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909*, 2 vols., compiled by William M. Malloy, continued by volumes issued in 1923 (Redmond) and 1938 (Trenwith); cited as *Treaties, Conventions, etc.*

⁴⁸ The United States having declined to become a party to the convention of the International Copyright Union, Sept. 9, 1886 (72 Brit. and For. State Papers 22), invented a protective system of its own. The Act of March 3, 1891, denied to citizens of foreign states the benefit of American copyright unless the law of the foreign state "permits to citizens of the United States the benefit of copyright on substantially the same basis" as to its citizens. This reciprocal condition was determined by Presidential proclamations. See *Treaties in Force*, 1956, pp. 243-250 (State Dept. Pub. 6427).

⁴⁹ Published in *Statutes at Large*, Vols. 47-64, with a complete list by countries of *Treaty Series* and *Executive Agreement Series*, Vol. 64, pp. B1107-1182.

⁵⁰ 2 Malloy, *op. cit.* 2157; 99 Brit. and For. State Papers 141.

⁵¹ Exec. Agr. Ser., No. 199; *Treaty Series*, No. 977.

⁵² T.I.A.S., No. 1543.

In Europe the word appeared at Vienna where the Final Act of June 9, 1815, in completing the provisions of the Treaty of Peace with France May 30, 1814, added "arrangements made necessary by the condition in which Europe remained after the late war," and invited "the princes and free cities which have concurred in the prescribed arrangements or to the acts confirmed hereby to accede to this general treaty," to which were annexed 15 treaties, conventions, constitutional acts and declarations concerning many European states, and two regulations enunciating rules of international law.⁵³ The transaction transcended the scope of a treaty between its eight formal parties. Thereafter the term "act" came to have the suggestion of a piece of international legislation, and appeared in treaties as a description of their decisive terms. It became familiar as the name of treaties of general import negotiated in conferences. Conferences at Berlin produced the General Acts concerning the Congo, February 6, 1885,⁵⁴ and concerning the Samoan Islands, June 14, 1889,⁵⁵ and another conference at Brussels negotiated the General Act for the Suppression of the African Slave Trade, July 2, 1890.⁵⁶ The General Act for the Pacific Settlement of International Disputes, Geneva, September 26, 1928, revised at Lake Success, April 28, 1949,⁵⁷ represents the current use of the term. The development of multilateral systems and institutions in the 19th and 20th centuries did not follow the Vienna precedent. The telegraphic, postal and other "unions" were established by conventions, a recognition of their limited scope in their respective fields of international activity. However, revisions⁵⁸ of the Copyright Convention (1886) on May 4, 1896, of the Industrial Property Convention (1883) and of the Trade-Marks Agreement (1891), on December 4 and 14, 1900, were effected by Additional Acts and the consolidation of the last two in the Convention of June 2, 1934, calls for ratification of "the present act."

The term "final act" was used at the Peace Conference at The Hague, July 29, 1899, to summarize work which produced three conventions, three declarations, incorporated as separately signed, and to record related resolutions, recommendations and *vœux* which were adopted. The International American Conferences followed the same practice, and in 1928 started the custom of signing only the Final Act, which in this series consists mostly of resolutions and recommendations on dozens of subjects. The final act is a compact piece of publicity, not in itself a treaty, though it may contain treaties and some of its contents may be made into treaties.⁵⁹

⁵³ Preamble and Art. 119 quoted, 2 Brit. and For. State Papers 3. The parties were Austria, France, Great Britain, Portugal, Prussia, Russia, Spain (by accession) and Sweden.

⁵⁴ 76 Brit. and For. State Papers 4; 3 A.J.I.L. Supp. 7 (1909).

⁵⁵ 81 Brit. and For. State Papers 1058.

⁵⁶ 82 *ibid.* 55; 3 A.J.I.L. Supp. 29 (1909).

⁵⁷ 71 U.N. Treaty Series 101.

⁵⁸ 88 Brit. and For. State Papers 36; 92 *ibid.* 807, and 106 *ibid.* 848; 192 I N. Treaty Series 17.

⁵⁹ See the keen analysis of the legal value of decisions taken at a transitional stage, in Herbert W. Briggs, "The Final Act of the London Conference on Germany," 49

The Final Act of the International Health Conference contained the arrangement for an interim commission to consolidate the complex of activities pending the coming into force of the Constitution of the World Health Organization, July 22, 1946, which it also contained and opened for signature.⁶⁰ An appropriate use of a final act is exemplified in the one drawn up by Switzerland for the Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims, which contains declarations and resolutions affecting the four conventions of August 14, 1949; the conventions were registered, the Final Act being submitted and printed with them as a related document.⁶¹ On the other hand, the Final Act of the parties to the General Agreement on Tariffs and Trade, signed at Torquay April 21, 1951, is the operative treaty covering inter-state agreements.⁶² A final act is not a treaty unless it, or part of it, contains intrinsic evidence that it is so intended.⁶³

Protocol in its original Greek means literally "the first glued in" and, like the table of contents of a modern book, was prepared as a summary by scribes for prefixing to manuscripts. A summary of contents or digest, with record of when, by whose authority and by whom it was prepared was prefixed to public acts as a *protocollum*, which acquired the quality of a certificate of authenticity.⁶⁴ In Roman and Byzantine civil procedure this meaning embraced the whole process of authenticating legal papers and proceedings.⁶⁵ The word has in it as a result of usage the three ideas of a perfecting addition, a summary, and formal identification. In international relations these three ideas attach to the word. A protocol may be an addition to a treaty, a summary of official proceedings, or a technique of the proper manner of doing things, including official etiquette.

In modern diplomatic parlance, official summaries of sessions of conferences were called protocols at and after the Congress of Vienna (1815), and in a number of instances the protocol of a particular session consti-

A.J.I.L. 148-165 (1955); use of the term is reviewed at pp. 149-152. The London decisions were put into formal instruments at Paris, Oct. 23, 1954, T.I.A.S., No. 3425.

⁶⁰ The Final Act, 9 U.N. Treaty Series 3; T.I.A.S., No. 1561; the Constitution, 14 U.N. Treaty Series 185; T.I.A.S., No. 1808.

⁶¹ 75 U.N. Treaty Series 5; the Final Act precedes the conventions registered as Nos. 970-973.

⁶² 142 U.N. Treaty Series 3.

⁶³ Those on declaration of death of missing persons, April 6, 1950, and road and motor transport, Sept. 19, 1949 (119 U.N. Treaty Series 99, and 125 *ibid.* 3), may be studied in this connection.

⁶⁴ Derived from Sieur Du Cange, *Glossarium mediae et infimae Latinitatis* (1657). Du Cange cites Justinian's *Novella* 40 to show that the *protocollum* was evidence of the good faith of the documents it listed, and a Sicilian quotation of 1352 that a protocolized document was a certified one. It was not a depository in which acts were kept nor a collection of rejected or falsified documents. In 1304 in France the *protocollum* was synonymous with the chartulary or register of documents.

⁶⁵ Leopold Wenger, *Institutes of the Roman Law of Civil Procedure*, translated by Otis H. Fisk (New York, Veritas Press, 1940), pp. 300-301; Hans Niedermeyer, *Über antike Protokoll-Literatur* (Göttingen, 1918), dealing with proceedings against St. Cyprian.

lated an instrument of treaty character.⁶⁶ Later these summaries, in *verbatim*, have been called *procès-verbaux* in French and *minutes* in English.

The protocol as a form of treaty is an addition or supplement to a primary instrument or to a prior transaction. The Final Protocol concluding the Boxer troubles, Peking, September 7, 1901,⁶⁷ was a record of China's compliance with conditions laid down in a note of the Powers of December 22, 1900. The Protocol for the Pacific Settlement of International Disputes, Geneva, October 2, 1924,⁶⁸ was designed to extend the scope of Articles 13, 15, 16 and 17 of the Covenant of the League of Nations. Amendments to the Covenant of the League of Nations were ratified by protocols stemming from Article 26, and the Statute of the Permanent Court of International Justice—a constituent instrument without enactments or provisions—was covered by a Protocol of Signature reading out of Article 17. Protocols that stand alone customarily include evidence of the treaty to which they are related, though occasionally a protocol may be a continuation of a series of documents or stem from a political situation which is not distinctly identified in its text. The most common use of the protocol is as a subsidiary to a primary instrument for adding to, clarifying, interpreting or modifying its provisions; so used, it is an integral part of the main instrument. Both protocol and *procès-verbal* are used to designate the paper which records exchanges of ratifications and the entry into force of a treaty; unless either is called for in the treaty itself, they would seem to be administratively related documents rather than integral parts of the main instrument.

A *Declaration* is by nature unilateral and requires association with a context in order to acquire the essential element of consensus characteristic of a treaty. The numerous declarations apparently standing alone in the records since 1919 are classified below as the accepting instrument of a disjunctive exchange of notes, and other declarations acceptable as treaties are invariably fractional parts of a larger transaction supplementary to other treaty instruments. Many treaty provisions "declare" instead of "agree" to terms, and it is often difficult to determine whether the ensuing obligation is several—that is, subject to interpretation by each

⁶⁶ The protocol concerning mediation before war, April 14, 1756, and the one concerning inviolability of treaties, Jan. 17, 1871, 46 Brit. and For. State Papers 63. See 61 *ibid.* 1193.

A recent use in this sense was made at the Crimean (Yalta) and Potsdam Conferences of heads of state, Feb. 4–11, 1945, and July 17–Aug. 1, 1945, on which "protocols of proceedings" were issued, including texts of some decisions as well as summaries of other conclusions. The contents of these "protocols" varied from firm decisions to be implemented later, statements of consensus of policy, to outlines of future plans. It is a highly technical task to determine what parts of them should be regarded as immediately binding engagements and what parts are only contingent and transitional conclusions of policy-makers. The answer in great part is to be found by tracing the subsequent treatment of specific points.

⁶⁷ 2 Treaties, Conventions, etc., 2006; Foreign Relations, 1901, Appendix.

⁶⁸ League of Nations, Records of the 5th Assembly, 3d Committee, p. 212 (Official Journal, Spec. Supp. No. 26). The protocol did not come into force.

party—or joint—that is, entailing reciprocal obligations *inter se*; phraseology on this point is frequently obscure in the absence of an evident *quid pro quo*. The treaty of April 19, 1839, establishing the neutrality of Belgium, violation of which by Germany brought the United Kingdom into war, was a several guaranty in the form of a declaration by each of the parties.⁶⁹ The General Act concerning the Samoan Islands, June 14, 1899,⁷⁰ consisted of reciprocal articles, each of which is a joint declaration on a particular matter. On the other hand, the treaty on the neutralization of Luxembourg, May 11, 1867,⁷¹ though not a declaration, put its status “under the sanction of the collective guaranty of the Powers” and none of the others felt bound to act when it was violated by Germany in 1914.

The three declarations in the Final Act of the Hague Conference, July 29, 1899,⁷² prohibiting the dropping of explosives from balloons, use of gas and of expanding bullets in war, were collective obligations which each party interpreted for itself. They were regarded as rules of law more than treaties, and as such followed the precedent of the Declaration of Paris, April 16, 1856, on maritime law which became generally accepted.⁷³ The London Declaration concerning the Laws of Naval Warfare, February 26, 1909, was an unsuccessful effort to make treaty rules for the projected International Prize Court.⁷⁴

Declarations standing alone are more likely to be pronouncements of policy expressive of important commitments than formal treaties. The Declaration by United Nations of January 1, 1942,⁷⁵ was indubitably a treaty, being an alliance of which the signatories were severally opposed to the parties to the Axis Pact of September 27, 1940, and acceptance of it was a condition of original membership in the United Nations. The American-British-Canadian Declaration on Atomic Energy of November 15, 1945,⁷⁶ has promissory characteristics of a treaty. The ministers of several American states signed a declaration on immigration at Montevideo, February 3, 1939,⁷⁷ which approved clauses of a convention to be signed later; this declaration appears to be a preliminary or provisional agreement. For the most part declarations are executive statements related to the treaty structure rather than a part of it, but very likely to be the basis of treaty instruments, or to indicate attitude toward a decision.⁷⁸

⁶⁹ 27 Brit. and For. State Papers 1000.

⁷⁰ 2 Malloy, *Treaties, Conventions, etc.* 1576.

⁷¹ 57 Brit. and For. State Papers 32; 3 A.J.I.L. Supp. 118 (1909).

⁷² 91 Brit. and For. Papers 1011, 1014, 1017.

⁷³ 46 Brit. and For. State Papers 26. By 1907 all states except the United States, Bolivia, Uruguay and Venezuela had accepted it. The United States assented to its application later; for its initial position, see 5 Moore, *Digest of International Law* 195.

⁷⁴ Malloy, *Treaties, Conventions, etc.*, Supp. 1913, p. 266 (Sen. Doc. 1063, 62d Cong., 3d Sess.; Cong. Vol. 6350); *Foreign Relations*, 1909, p. 318.

⁷⁵ 204 L.N. Treaty Series 386, where the Axis Pact is printed as an annex in a text registered by the United Kingdom that was surely not certified as an official original.

⁷⁶ 3 U.N. Treaty Series 123.

⁷⁷ 8 Hudson, *International Legislation* 267.

⁷⁸ The declaration on problems of common interest by the presidents in connection with the American-French lend-lease settlement, May 28, 1946 (84 U.N. Treaty Series

The Agreement Group

Agreement (*accord, arrangement; Vereinbarung, Abkommen, Übereinkommen*) is a treaty which deals reciprocally with a specific matter, usually a concrete subject not fraught with political elements and therefore not too difficult to adjust. The word gives trouble because, as a meeting of minds, it is loosely used of all kinds of treaties and of their parts, and because it covers many types of documents which are also given particular names, and which are not treaties. The French and German versions only indicate the variety of use, and the deviations do not stop here. At least a dozen of the lesser-used names listed in the table may appear synonymously as agreements. "Provisional or interim agreement" is the equivalent of "modus vivendi," which may be expressed as "agreement to modus vivendi." These choices of language do not affect the quality of a document as a treaty, but they do contribute to the impression that concluding treaties is an imprecise art.⁷⁹

Agreement as the name of a specific type of treaty describes a single instrument in the general form of the treaty, differing from a convention in that it deals with a narrower or less permanent subject matter. Whether the agreement is bilateral or multilateral, the form is flexible and reflects the importance of the subject to the parties. Agreements may be intergovernmental or interdepartmental and appear with or without preambles, which are customarily used if the negotiators act under powers inherent in their capacity as ambassadors, ministers or delegates. The parties are governments or their departments. The contents (*narration*) of an agreement are limited in scope, focused on a single objective. Prior executive authority to conclude an agreement exists in many states, so that ratification may not be required by all parties. Entry into force for a party by signature, acceptance or accession is common. Agreements vary in their formal characteristics mostly in relation to the status of their makers, who range from secretaries of foreign relations, diplomatic officers, foreign office personnel to government departmental officials.

In addition to agreements *eo nomine* the following are considered here as reciprocal types of agreements, less formal, more restricted in subject matter, but still concluded under adequate powers: *accord*, arrangement, *compromis*, exchange of notes (disjunctive exchange of notes, optional clause), *modus vivendi*, agreed minutes, *procès-verbal*, memorandum of understanding.

Accord seems to get into English because the French word is not translated as its equivalent, agreement. (The French *agrément* is exclusively used as the consent to accepting a diplomat.)

59; T.I.A.S., No. 1928), and the joint policy declaration concerning the Korean Armistice, July 27, 1953, by the governments of the participating United Nations Members (4 U. S. Treaties 230; T.I.A.S., No. 2781) illustrate the two types.

⁷⁹ The Department of State uses a title "agreement effected by exchange of notes," which item is certified to the United Nations Secretariat as an "exchange of notes," constituting an agreement," each note being separately certified, and the latter title is used in the Treaty Series.

Arrangement, also French as well as English, is invariably a document of less moment, usually of less duration, than an agreement.⁸⁰

Compromis (special agreement) defines the question to be arbitrated by a tribunal set up for the particular issue or established by a separate treaty.

Exchange of notes is the most flexible form of treaty, and recently of increasingly extensive use as a device to record routine agreement upon all kinds of transactions. The exchange consists of an offer and an acceptance. The participants are usually the ministers of foreign affairs, or their deputies, and the heads of diplomatic missions acting in virtue of powers inherent in their offices.⁸¹ It is a bipartite document; either piece may be a formal diplomatic note, a letter, message, memorandum or *aide-mémoire* signed or initialed, or an unsigned *note verbale*, with or without seals. The offering instrument contains a text of the proposed agreement and the acceptance invariably repeats it verbatim, with assent. Seldom does the offer cover a single-text agreement for acceptance.⁸² Exchanges of notes are used mostly to keep foreign office transactions running smoothly in a time when the recurrence of administrative situations, overturn of personnel and pressure of business make it inadvisable to leave adjusted points disseminated in correspondence files. They very seldom require ratification by any state and are ordinarily in force when the offer is accepted. Though superficially of "minor importance"⁸³ as dealing with minor precise and even transitory points in relations between states, they may deal with subjects of significance or economic magnitude,⁸⁴ and may have important political effects or repercussions.⁸⁵ The desire to

⁸⁰ Arthur J. Balfour, in a draft which he first called a treaty, substituted "arrangement" so as to be "deliberately vague" concerning the significance of his proposal, which was to find a satisfactory way to abrogate and supersede the Anglo-Japanese alliance of July 13, 1911, at the Washington Conference of 1921-1922. Foreign Relations, 1922, Vol. II, p. 2.

⁸¹ Exchanges of notes in these days are often made by departmental heads or agents outside of the foreign office, but still officials of the executive branch of government. Since none of them do—or ought to—act without powers issued either by the head of state or the minister for foreign affairs, the distinction of international "inter-departmental" agreements now in use seems to be unnecessary. The term "intergovernmental" to distinguish between treaties between heads of state and those not so designated, for the same reason of the existence of adequate powers, likewise seems to be of doubtful utility.

⁸² Chile-Norway, April 30, July 27, 1923, 33 L.N. Treaty Series 249; Belgium and Great Britain, Money Orders, Feb. 18, 1925, 33 *ibid.* 341.

⁸³ Sir Ernest Satow, *A Guide to Diplomatic Practice* 379 (3d ed.).

⁸⁴ Much of the funds appropriated by the United States for economic co-operation, mutual security and technical assistance has been allocated by exchange of notes.

A property transfer and territorial assignment of large size were effected by the exchange of notes of Sept. 2, 1940, by which the United States turned over 50 destroyers to the United Kingdom for a series of bases in the Western Hemisphere, Exec. Agr. Ser., No. 181, 54 Stat. 2405; 203 L.N. Treaty Series 201; an agreement of March 27, 1941, implemented those notes, 55 Stat. 1560, Exec. Agr. Ser., No. 235, 204 L.N. Treaty Series 15; further, T.I.A.S., Nos. 1717, 1809, 1933, 1985, 2105.

⁸⁵ The Rush-Bagot agreement of July 28/29, 1817, concerning naval vessels on the

settle with precision much of the detail of international relations has encouraged the use since 1920 of the exchange of notes, and its informal character has facilitated making casual and short-lived decisions.⁸⁶ Its status as a form of treaty has not been questioned.⁸⁷

The separate exchange of notes is a relatively new phenomenon, but the exchange of notes subsidiary, additional or complementary to a more formal type of treaty is an old form. Because of their relationship to it, these exchanges are integral parts of the main instrument, constituting with it a single transaction.⁸⁸ It may happen that subsequent changes in a main instrument within the executive authority will be determined by an exchange of notes.⁸⁹ Ministerial management of a treaty structure involving accession, renewal, extension, prolongation and termination of a treaty is sometimes effected by exchange of notes having binding force as applications of terms of the main instrument; they are not always published. None of these uses involves a status different from that of the main instrument which they supplement.

Disjunctive exchange of notes describes a kind of transaction which is a

⁸⁶ Great Lakes still lives and has vitally affected policy on a continent, 1 Malloy, *Treaties and Conventions*, etc. 628; revisionary exchanges of notes, 1939-46, T.I.A.S., No. 1836.

⁸⁷ British establishment of diplomatic relations with the Soviet Union, Dec. 20/21, 1924, U. K. Treaty Series, No. 2 (1930), 99 L.N. Treaty Series 61; U. S. establishment of diplomatic relations with the Soviet Union, Nov. 16, 1933, European and British Treaty Series 2; British agreement with Germany on naval armament, Jan. 18, 1935, U. K. Treaty Series, No. 22 (1935), 161 L.N. Treaty Series 9.

⁸⁸ J. L. Weinstein, "Exchanges of Notes," 29 *British Year Book of International Law* 205-226 (1952), comprehensively deals with the form, with full references to the subject of the subject. He found 1,078 exchanges of notes in the 4834 instruments published in the 205 volumes of the League of Nations Treaty Series.

⁸⁹ Weinstein (*loc. cit.* 222-223) examined 35 court cases, all of which "have treated exchanges of notes as being within the category of treaties." Harvard Research in International Law, *Law of Treaties*, did not include exchanges of notes in its draft because its procedural provisions would not apply to them, but it asserted that "in questionable, agreements concluded in this form have the juridical force and effect of treaties as the term is usually understood." 29 A.J.I.L. Supp. 698 (1935).

⁹⁰ See the series of notes with the Treaty of Friendship and Cooperation between Panama and the United States, March 2, 1936, Treaty Series, No. 945, 53 Stat. 1507. A more complex instance are the transactions of May 26, 1952, and Oct. 27, 1954 terminating the occupation regime in the Federal Republic of Germany, which consisted of exchanges of notes, declarations, and understandings. U. S. Senate, *Executive Documents*, 83d Cong., 2d Sess., pp. 93-169; T.I.A.S., No. 3425.

⁹¹ See the agreements effected by exchange of notes to bring agreements on cooperation into harmony with Public Law 47, 81st Cong. (1 U. S. Treaty Series 181-187), with Denmark, France, Iceland, Ireland, Italy, Luxembourg, Norway, Sweden and the United Kingdom, T.I.A.S., Nos. 2022, 2023, 2026, 2027, 2028, 2030, 2032, 2034, 2036. Instruments amending, modifying or interpreting treaties that have been registered are customarily published in annexes to the League of Nations and United Nations Treaty Series under the registration number of the main instrument. This practice is especially with respect to multilateral conventions, provides a reliable means of determining the current status of the main instrument.

⁹² Publication of these documents in the annexes of the United Nations Treaty Series, however, tends to increase.

come into vogue since 1919. It consists of a treaty provision which constitutes a direct offer that is accepted subsequently and separately by a state in a declaration or notification, the two creating a bilateral or multilateral treaty obligation as the case may be. The best known and most used example is the process of accepting compulsory jurisdiction of the International Court of Justice. Article 36(2) of the Statute lays down conditions under which such jurisdiction may be accepted by unilateral declaration of its parties. An optional clause for that purpose was annexed to the Protocol of Signature of the Statute, December 16, 1920, but declarations since 1945 are made to Article 36(2) of the Statute; in both cases the unilateral declarations, *mutatis mutandis*, established multilateral obligations.⁹¹ Committee IV/2 at the San Francisco Conference reported that "unilateral engagements of an international character which have been accepted by the state in whose favor such an engagement has been entered into" are agreements within the meaning of Article 102 of the Charter.⁹² The treaties of the Paris Peace Conference began a practice of giving victorious states a right to designate by notification which treaties suspended by war they wished to revive; the authorizing articles and the notifications constitute disjunctive bilateral exchanges of notes.⁹³ The declarations of states admitted to the United Nations, "which accept the obligations contained in the present Charter," with Article 4, constitute disjunctive bilateral exchanges with the United Nations which are multilateral with respect to the other Members.⁹⁴

Decisions made by an organ of the League of Nations or the United Nations, pursuant to a treaty provision, and their acceptance by a state, constitute a second type of disjunctive exchange of notes. Article 93(2) of the Charter provides that non-members of the United Nations may become parties to the Statute of the International Court of Justice "on conditions to be determined in each case by the General Assembly"; the

⁹¹ More than 100 declarations accepting compulsory jurisdiction have been made and registered in both League of Nations and United Nations Treaty Series.

⁹² United Nations Conference on International Organization, Documents, Vol. 13, p. 705; Selected Documents, p. 877 (State Dept. Pub. 2490).

⁹³ The treaties of the Paris Peace Conference, 1919-20: Germany, Art. 289; Austria, Art. 241; Bulgaria, Art. 168; Hungary, Art. 224; the Paris treaties of Feb. 10, 1947: Bulgaria, Art. 8; Finland, Art. 12; Hungary, Art. 10; Italy, Art. 44; Rumania, Art. 40; Japan, Sept. 8, 1951, Art. 7.

Notes of acceptance have been registered: 5 L.N. Treaty Series 380; 26 U.N. Treaty Series 103-119; 29 *ibid.* 101; 48 *ibid.* 9; 67 *ibid.* 153, 157; 98 *ibid.* 21; 104 *ibid.* 25-118. The 1947 and 1951 treaties prescribe registration. Revivals are usually by name, with citation to the text. The United Kingdom in its notification to Italy (104 U.N. Treaty Series 41) printed, and so registered, the texts of 9 treaties dated 1873-1911.

⁹⁴ The declaration is contained in the application and the applicant is a Member from the date of the General Assembly's decision. In the United Nations Treaty Series the declarations are printed as follows: Afghanistan, Vol. 1, p. 39; Burma, 15 *ibid.* 3; Iceland, 1 *ibid.* 41; Indonesia, 71 *ibid.* 153; Israel, 35 *ibid.* 53; Pakistan, 8 *ibid.* 57; Sweden, 1 *ibid.* 43; Thailand, *ibid.* 47; Yemen, 8 *ibid.* 59; reg. nos. 3043-3055, 3155, 3727.

state incorporates the conditions in its accession to the Statute.⁹⁵ Article 35(2) of the Statute, providing that the Security Council shall lay down conditions under which the International Court of Justice shall be open to non-member states, was made effective by a resolution of October 15, 1946, and accepted by several states.⁹⁶

A variation developed from the investment by treaty of the Council of the League of Nations with supervision over minorities in 13 new states or areas. The Council took the assignment as a general mandate, and when Albania, Estonia, Iraq, Latvia and Lithuania were admitted as Members of the League, had them make declarations which it pronounced to be "obligations of international concern."⁹⁷

Identification of these provisions, declarations and notifications as conjunctive exchanges of notes assimilates to the standard system of treaty forms what have hitherto appeared to be diplomatic oddities, though undoubtably creating legal obligations.

Procès-verbal, as well as its English equivalent, *agreed minutes*, occasionally gets attached to a document of treaty quality. In legal French it defines the digest of a process for court record. Internationally the form is most used for ministerial acts such as the record of exchange of ratifications of treaties, a procedural paper. When used separately, it identifies an agreement modifying or perfecting a previous transaction.⁹⁸

Modus vivendi, provisional, preliminary or interim agreement or arrangement, is less used than formerly, for exchanges of notes are popular for taking care of temporary situations that require current definition. This form of treaty looks toward a settlement of its subject either by preparing for it or laying down its groundwork; if the matter has been controversial, the *modus vivendi* usually means what it says, namely, that the parties have found, or are on the way to finding, a method of living together with the problem.⁹⁹

⁹⁵ Switzerland, Liechtenstein, San Marino and Japan have deposited instruments accepting such resolutions. 7 U.N. Treaty Series 111; 51 *ibid.* 115; reg. nos. 2495 and 2524.

⁹⁶ I.C.J. Yearbook, 1955-1956, p. 32. The general declarations of Cambodia, Ceylon, Finland, Italy and Laos were superseded by automatic accession to the Statute on their admission to the United Nations Dec. 14, 1955. Declarations continue for the Federal Republic of Germany, the Republic of Vietnam, and Japan, which was obliged to act by Art. 22 of the Treaty of Peace of Sept. 8, 1951, until it accepted the Statute April 2, 1954. The League of Nations resolution was adopted May 17, 1922.

⁹⁷ Denys P. Myers, *Handbook of the League of Nations, 1920-1935*, p. 124.

⁹⁸ The *procès-verbaux*, Nov. 17, 1937, modifying the Conventions on Transport of Passengers and Goods, 7 Hudson, *International Legislation* 893, 896; the *procès-verbal* with Switzerland on the legal status of the International Labor Organization after dissolution of the League of Nations, 15 U.N. Treaty Series 377; *agreed minutes* of the Mixed Commission of Norway and the Occupied Zones of Germany, Feb. 14-17, 1949, 30 *ibid.* 137.

⁹⁹ See the *modus vivendi*, 1888-1907, between Great Britain and the United States on fisheries matters, 1 Malloy, *Treaties* 738, 743, 760, 805, 811, 833; interim arrangements, San Francisco, June 26, 1945, Exec. Agr. Ser., No. 461; *modus vivendi*, Belgium-Luxembourg Economic Union and Turkey, March 12, 1947, 37 U.N. Treaty Series 21.

Memoranda of agreement and *understandings* are seldom used separately from other forms. If, however, a clarification or alteration of a previously concluded instrument is desired, either form may be reciprocally executed for the purpose. Both are more used in treaty practice in the unilateral form.

Regulations defining treatment of certain phases of the subjects were from the beginning of the systems annexed to the conventions setting up the Universal Postal Union and the International Telegraphic Union. The regulations in some instances became revisable by an executive body subordinate to the plenary conferences. The Paris Convention for the Regulation of Aerial Navigation, October 13, 1919,¹⁰⁰ set up the International Commission for Air Navigation which was given power to amend the provisions of Annexes A-G (Article 34c) in order that these regulations of air navigation might be kept current with technical development. The International Telecommunication Convention of Madrid, December 9, 1932,¹⁰¹ reorganized this field and confined the convention to the constituent provisions of the Telecommunication Union, "completed" by Telegraph, Telephone, and General and Additional Radio Regulations, which were subject to revision by "administrative" conferences of signatories of each; whereas the convention could be revised only by a "conference of plenipotentiaries" which had ratified it. Each regulation sets up a technical consulting committee operating under its own "internal regulations." In the World Health Organization¹⁰² the Health Assembly (Articles 21, 22) can convert the provisions of treaties in force or other international acts into regulations that come into force for members which do not reject them within specified periods. This device is an effort to keep abreast of technical advances in sanitary and quarantine requirements, nomenclature of diseases, causes of death, and public health practices,¹⁰³ international standards with respect to diagnostic procedures, safety, purity and potency of biological, pharmaceutical and similar products, and their advertising and labeling.

Rules were part of early commercial treaties with China and other Far East countries used to establish common premises between the parties. Documents so designated have also been used with multilateral instruments but not separately.

The other terms in the table, unusual in treaty nomenclature, require no explanation as to meaning and are generally derived from ordinary

¹⁰⁰ 3 Treaties, Conventions, etc. 3768; 11 L.N. Treaty Series 173.

¹⁰¹ 4 Treaties, Conventions, etc. 5379; revised Oct. 2, 1947, T.I.A.S., No. 1901, and Dec. 22, 1952, *ibid.*, No. 3266. The United States is a party to the General Radio (Treaty Series, No. 948) and Telegraph (1949 revision, T.I.A.S., No. 2175; 2 U. S. Treaties 17) Regulations. The regulations have not been registered.

The Congress of the World Meteorological Organization (Art. 7e) can adopt regulations covering meteorological practices and procedures. T.I.A.S., No. 2052; 1 U. S. Treaties 281.

¹⁰² T.I.A.S., No. 1808; 14 U.N. Treaty Series 185.

¹⁰³ 66 *ibid.* 25; the sanitary and quarantine regulations are also in force, reg. no. 2303.

practice or are simply descriptive of a particular document. It was a compact of friendship and commerce that Matthew C. Perry chose to make in 1854 with the Lew Chew (Ryukyu) Islands.¹⁰⁴ The King of France made loan contracts in 1782 and 1783 with the then 13 States of the United States.¹⁰⁵ Leases have appeared as separate instruments, but ordinarily have been preceded by a convention or agreement concerning the area affected.¹⁰⁶ Other terms that have been used have been attached to subsidiary instruments, and reflect the varied nature of treaty transactions and the circumstances in which they are concluded. Of this character the following are recorded in the table: additional articles, code, communiqué, instrument, measures, modification, plan, provisions, recommendation, resolution, scheme.

Armistice has entered the diplomatic area from the military sector. The Hague Conventions of 1899 and 1907 concerning the Laws and Customs of War on Land¹⁰⁷ brought the military rules of international law within the purview of foreign offices, and their stipulation of the content of the general armistice included political and economic provisions. The current form of the general armistice has "in effect rendered the preliminaries of peace obsolete,"¹⁰⁸ for modern communications make it possible for it to be negotiated under instructions of executive authority by military and political representatives equipped with powers. The treaty status of the armistice is transitional. The European Advisory Commission worked out an armistice for Germany which the United States, the United Kingdom, the Soviet Union and France approved in September, 1944; but an "Act of Military Surrender" was improvised for signing May 8, 1945. The approved "armistice" was revised into the "Declaration Regarding the Defeat of Germany," June 5, 1945.¹⁰⁹ The United States publishes armistices in its regular *Treaty Series*, as does Canada, but the United Kingdom publishes them only as Command State Papers. The United States put three of the six instruments of 1944-1945 in the *United Nations Treaty Series* and Canada one.¹¹⁰ The League of Nations and the United Nations have registered armistices made directly under their auspices.¹¹¹

¹⁰⁴ 1 Malloy, *Treaties* 1048.

¹⁰⁵ *Ibid.* 483, 487.

¹⁰⁶ An agreement for the lease of coaling stations from Cuba in February, 1903, preceded the formal lease in July (*ibid.* 358, 360). Between 1897 and 1915 some 16 instances of leased territory occurred. Institut Intermédiaire International, *Répertoire général des traités*, index *Bail*.

¹⁰⁷ 2 Malloy, *Treaties* 2042 and 2054; 2269 at 2287.

¹⁰⁸ Howard S. Levie, "The Nature and Scope of the Armistice Agreement," 50 *A.J.I.L.* 880-906 (1956) at 884, 901, and 906, where the provisions of the new Law of Land Warfare are cited.

¹⁰⁹ 68 U.N. Treaty Series 189; T.I.A.S., No. 1520. The Act of Military Surrender is Exec. Agr. Ser., No. 502.

¹¹⁰ Bulgarian and Hungarian armistice agreements and the Japanese instrument of surrender, 123 U.N. Treaty Series 223, 140 *ibid.* 397, 139 *ibid.* 387. Canada filed and recorded one protocol of the Finnish armistice and registered another, 45 U.N. Treaty Series 125, 311.

¹¹¹ The armistice between Lithuania and Poland, Nov. 29, 1920, made under the auspices of the League of Nations Military Commission of Control, 9 L.N. Treaty

II. WHAT A TREATY IS NOT

Policy in international relations is the attitude or position which a state is able to take, in pursuit of national interests, toward the attitude or position of other states on matters of their common concern. It is manifested in some form or degree in every transaction between states. It is fluid and fluctuates in response to internal and external conditions, events and the general pattern of international relations. The conductors of foreign policy constantly seek to make their national attitudes or positions definite and stable by invoking rules of international law or by formulating aspects of policy in treaties. Subjection to the rules is facilitated by the existence of multilateral standards such as those expressed in the Charter of the United Nations.

The International Court of Justice, in reviewing the actions of states in cases brought before it pursuant to Article 38 of the Statute, determines legal obligation, whether derived from customary law or treaties. It is an essential preoccupation of the Court to distinguish between what the conductors of foreign relations reserve for application of their political discretion and what they have advanced to the stage of control by law or treaty.

It is proposed here to examine the dividing line between legal rights and obligations assumed by states as a mere function of policy and those which are intended to be of treaty status. While both treaties and firm decisions other than treaties originate in policy, it must be borne in mind that, once determined, they both become passive elements in foreign relations, whereas policy is ever active, debatable, controversial. Moreover, a treaty is always a record of where a state is, not where it is going, for the treaty records what, at a given time, it was possible to agree to; a treaty is a foundation on which policy may build new relations which the treaty itself does not create.¹¹²

The operation of policy by the conductors of foreign relations is designed to produce nationally satisfactory situations vis-a-vis other states. It constantly produces fixed and semi-fixed points. An incident is resolved and a useful precedent is established for application to a subsequent like occurrence. Study of a question may yield a clause that meets an unfulfilled need and can be earmarked for future use. Conditions or events may dictate issuance of statements outlining aims or a course of action which embody items of agreement. Negotiations produce consensual points closely related to active policy matters. The journalists and the working diplomats have acquired habits of telling the world about anything that even looks like a meeting of minds; it is a nice question which of them does

Series 64. The four 1949 Armistices between Israel and Egypt, Lebanon, Jordan and Syria respectively, effected through United Nations mediation, were registered *ex officio*, 42 U.N. Treaty Series 251-327. The Korean Armistice of July 27, 1953, technically made between the Commander-in-Chief, United Nations Command, and the commanders of the "Korean People's Army and the Chinese People's Volunteers," remains in U.N. Docs. S/3079 and A/2431.

¹¹² Less definitely and confidently the same may be said of political decisions other than treaties.

the more damage in over-exciting expectations. Nevertheless, there are constant outgivings in the operation of policy that are apparently formal or fixed decisions, in addition to the steady production of actual treaties.

Until points determined in the operation of policy are negotiated into treaties, they are elements of political action, subject to all the vicissitudes of unresolved international questions. They are politically interpreted and, if legal quality is at issue, law is applied by counsel for a client, not by a judge. The art of the possible is not the legal art. When, however, policy has matured a matter or a point for stable decision and has embodied the formulated decisions in a treaty, this consensus of the parties invariably accepts the instrument as a firm rule of conduct and applies judicial rules of interpretation to it.

The only way to distinguish between treaties and decisions of states less than treaties is to gauge the document by the characteristics inherent in a treaty. The court's primary test of a document is whether it is legally binding; if it purports to be a treaty, it is proved against treaty definitions. Registration of an instrument under the Covenant showed that the registrant held it to be "binding" and registration is a *prima facie* indication that the document is a treaty or agreement.¹¹³ The editing of national collections of treaties is not conclusive evidence that all instruments contained in them are treaties or that all treaties are included.¹¹⁴

The frame of reference for indicating what is not a treaty is summarized from Sir Gerald G. Fitzmaurice's Report on the Law of Treaties: A treaty is a formally agreed instrument concluded and brought into force by authorized executive agents of entities (states or international organizations) "which are subjects of international law possessed of international personality and treaty-making capacity, and intended to create rights and obligations, or establish relations, governed by international law."¹¹⁵ Perhaps the most decisive criterion is executive authorization by full or other powers.

The instruments described below are not to be rated as treaties or agreements because they do not conform with the requisite criteria, though subject to rules of international law.¹¹⁶

¹¹³ Lauterpacht (Report, U.N. Doc. A/CN.4/87, p. 4) proposed that "in the absence of evidence to the contrary," registered instruments should be deemed to create "legal rights and obligations."

The Secretariat, in its monthly Statement of Treaties and International Agreements Registered or Filed and Recorded (ST/LEG/Ser.A/105), says it accepts the position of the Member State submitting an instrument "that so far as the party is concerned the instrument is a treaty or international agreement within the meaning of Art. 102." Registration "does not imply a judgment by the Secretariat on the nature of the instrument, the status of the party, or any similar question." The Secretariat understands "that its action does not confer on the instrument the status of a treaty or international agreement if it does not already have that status and does not confer on a party a status which it does not otherwise have."

¹¹⁴ See use of "international acts" in United States volumes, under *Act*, above.

¹¹⁵ Art. 2 modified by Arts. 9 and 13, U.N. Doc. A/CN.4/101.

¹¹⁶ The subject, but not the phrasing, of the items is attributed to David Hunt and Miller, *Treaties and Other International Acts of the United States of America*, Plan

"Unperfected treaties" are those which have not gone into force and are not pending. Bilateral texts are historical;¹¹⁷ multilateral texts usually have gone into force between other signatories.¹¹⁸

A treaty signed but not yet ratified is not legally binding, being concluded but not yet in force. Those who wish can call it morally binding. The Permanent Court of International Justice observed that, in the period between signing and entry into force of an instrument, the signatory, though not obliged to act in accordance with its terms, should not act contrary to the intendments of such instrument.¹¹⁹

Technical arrangements made pursuant to or confirmed by political agreements, especially if originating with or entrusted to governmental authorities outside of the foreign relations department, if not optionally made a part of the agreements, are not international agreements.¹²⁰

Unilateral acts which authorize or establish relations with foreign states, including papers relating to recognition of a state or government and those relating to the establishment and maintenance of diplomatic intercourse, as well as those which establish a relation by means of national statutory or other action, are not treaties.¹²¹ Unilateral declarations, etc., which

of the Edition, Vol. I, pp. 3-14; Harvard Research, *Law of Treaties*, *loc. cit.* 710-722; 5 *Repertory of United Nations Practice*, Art. 102, pars. 22-28.

¹¹⁷ A Convention on Pacific Sockeye Salmon Fisheries of Sept 2, 1919 (*Foreign Relations*, 1919, Vol. I, p. 229) failed; others of May 25, 1920, and March 27, 1929 (*ibid.* 1920, Vol. I, p. 387, and 1929, Vol. II, p. 55) were followed by the Convention with Canada of May 26, 1930, which went into force July 28, 1937, *Treaty Series*, No. 918; 50 Stat. 1355; 184 L.N. *Treaty Series* 305.

¹¹⁸ The Treaty of Peace with Germany, Versailles, June 28, 1919, went into force for all signatories except China, Ecuador, the Hedjaz and the United States.

¹¹⁹ In the *Mavrommatis Jerusalem Concessions Case* the Permanent Court of International Justice, asserting that there were precedents for the point, said that the parties had conducted their negotiations "on the basis of Protocol XII" since its signature, the applicant not being under "an immediate obligation to conform to these provisions." Ser. A, No. 5, pp. 31, 32, 34, 35; 1 Hudson, *World Court Reports* 316, 317, 319. The concession was examined under the provisions of the Palestine Mandate, July 24, 1922, as complemented by the Protocol, signed July 24, 1923 (28 L.N. *Treaty Series* 203), which was not in force during the negotiations.

¹²⁰ This position existed in the League of Nations. Notes of Sept 10 and 15, 1920, between Belgium and France, which confirmed a military understanding of Sept. 7, were registered under Art. 18 of the Covenant, 2 L.N. *Treaty Series* 128. An agitation arose for registration of the military understanding, which was not presented. An Advisory Committee of Jurists proposed certain amendments to the Covenant, but they were not approved by the Assembly. The military understanding remained secret, subject to revision, which last occurred March 6, 1936. The United Kingdom on Feb. 26, 1921, informed the Secretary General that in its opinion certain financial agreements were not registrable as treaties (*Official Journal*, 1921, p. 224). Harvard Research, *Law of Treaties*, *loc. cit.* 913; *Foreign Relations*, The Paris Peace Conference, 1919, Vol. XIII, p. 138 (The Treaty of Versailles and After, State Dept. Publication 2724 or 2757).

¹²¹ Acts of Congress and Presidential proclamations in the United States have had the effect of establishing the equivalent of treaty relations in some fields where the Government was not ready to conclude treaties. An instance is the evolution of a British Order in Council, Jan. 9, 1863, on the "rules of the road at sea" into the regulations of the Conventions on Safety of Life at Sea, May 23, 1929, and June 10,

can be identified as parts of the "disjunctive exchange of notes" described above are excepted.

Legislation of two or more states which is reciprocally complementary and which establishes an international relation constitutes an international act, not strictly a treaty.¹²²

Diplomatic correspondence resulting in a consensus which is not formalized in an exchange of notes or other treaty form is not *prima facie* a treaty. Politically it may acquire a pseudo-treaty status or remain a fixed point of international policy.¹²³

Territorial acquisition or loss is a primary subject for regulation by treaty, but it is not exclusively so and it is not practicable in all cases to set forth specific instruments adequately recording the legal obligations.¹²⁴

1949 (4 Treaties, Conventions, etc. 5134; 136 L.N. Treaty Series 81; T.I.A.S., No. 2495; 3 U. S. Treaties 3450; 164 U.N. Treaty Series 113; 1948 regulations, T.I.A.S., No. 2899, 4 U. S. Treaties 2956). The original rules were revised at two conferences in 1884 and 1889 and were made internationally effective for many years by national enactment. The United States enacted the Revised International Rules and Regulations for Preventing Collisions at Sea verbatim on March 3, 1885 (23 Stat. 438), but they were not concurrently in force between states until July 1, 1897 (29 Stat. 885), and were not put into treaty form until a generation later.

Presidential proclamations have declared a statute of Congress operative or not operative as to a particular country. Miller, *op. cit.* 139-156, gives a list of proclamations affecting foreign relations 1793-1931, and classifies them under 20 headings, *ibid.* 157-173. Several have become treaty subjects. Copyright, long handled by proclamation, is also covered by the Universal Copyright Convention (Treaties in Force, 1955, pp. 227-234). Ship loadlines (46 U.S.C. secs. 85d, 88d) are now subject of the convention of July 5, 1930, 135 L.N. Treaty Series 301; 4 Treaties, Conventions, etc. 5287, 5348. Reciprocal vessel inspection (46 U.S.C. sec. 362), tonnage dues (*ibid.* sec. 141) and tonnage measurement (*ibid.* sec. 81) are arranged both by national reciprocal action and by treaty.

¹²² Annexation of Texas to the United States was the object of a treaty signed April 12, 1844, which was rejected by the Senate and thus became an "unperfected treaty." President Tyler recommended that its terms be adopted by an "act to be perfected and made binding on the two countries." Congress on March 1, 1845, adopted a Joint Resolution calling for annexation and giving the President the option of doing it by treaty "or by articles to be submitted to the two Houses of Congress." Texas responded by a Joint Resolution of its Congress and an Ordinance of a Convention, dated June 23 and July 4, 1845. President Polk in his message of Dec. 2, 1845, called these documents "the compact of their union," and Congress by Joint Resolution on Dec. 29, 1845, admitted Texas as a State. 4 Miller, *op. cit.* 689-739.

¹²³ An instance is the China "Open Door" correspondence in 1899-1900 by the United States with France, Germany, Great Britain, Italy, Japan and Russia. 1 Malloy, Treaties 244-260. This has much the appearance of exchanges of notes, varying in responsive identity. Secretary of State John Hay on March 26, 1900, informed the other states that he regarded the undertaking as final, but none confirmed that conclusion.

¹²⁴ Neither ownership nor boundaries of territory can be determined solely by treaty instruments in some parts of the world or in all cases. It would be desirable if all boundaries were specifically described in formal treaties, but many of them rest on the evidence of assembled data not processed into an agreement. 1 Miller, *op. cit.* 9, refers to the Island of Navassa, site of a lighthouse, the ownership of which would require a monograph to record; citing the review of the documents in *Jones v. U. S.*, 137 U. S. 202, 205, 217 (1890), he comments that the "form by which such acquisition

Arbitral awards or decisions of international commissions for settlement of private or governmental damage or monetary claims are not parts of the *compromis* or other instrument which established them; they are judicial, not executive, acts. Nevertheless, international awards or decisions of a territorial character by tribunals, which are accepted by the parties to the *compromis*, can be regarded as parts of that instrument, because the intention was to obtain from the tribunal a conclusion having a permanent or at least a definitively future international effect.¹²⁵

Loan agreements between governments and between governmental agencies are or are not treaties, broadly speaking, according to whether or not they are intrinsically political or financial. Loans to governments or specifically to their agencies directly from the public funds (the Treasury) in principle are made by treaty.¹²⁶ Loans in money or kind from a governmental agency to a similar agency of another government may be a treaty or contractual transaction, according to the authority of the lending agency.¹²⁷ A governmental agency, operating with its own appropriated

is achieved is quite immaterial" and it "may be by an international agreement which is not in any" sense a treaty.

Reports of delimitation commissions set up under the terms of a treaty to define boundaries are not treated as part of the treaty, though their data may be incorporated in a subsequent treaty. See Alexander Marchant, *Boundaries of the Latin American Republics 1493-1943* (State Dept. Pub. 2082).

¹²⁵ *The Island of Palmas Award* (22 A.J.I.L. 867 (1928), 2 Int. Arb. Awards 829) is illustrative.

¹²⁶ During the war of 1914-18 some states made Treasury loan agreements in precise amounts, but the United States extended lines of credit followed by funding agreements negotiated by the World War Foreign Debt Commission, which in no case was able to realize the conditions of the Act of Congress of Feb. 9, 1922 (42 Stat. 363). Each settlement, therefore, was separately approved by Congress as an amendment to that Act. The agreements were regarded as Treasury or statutory acts, though some other states (France, for instance, 100 L.N. Treaty Series 28) handled them as treaties. The "Hoover Moratorium" of 1932 was effected by interdepartmental agreements, U. S. Treasury, *Report of the Secretary, 1932*, pp. 290 ff.; *Treaties in Force . . . 1941*, pp. 175-180 (State Dept. Pub. 2103).

Under the Act of March 11, 1941 (55 Stat. 31), lend-lease master agreements were made with governments by an independent agency acting for the President and all, except those with 18 American republics, were published in the Executive Agreement Series. The Department of State, to which lend-lease functions were transferred Sept. 27, 1945, negotiated settlements which have been published in the *Treaties and Other International Acts Series*. Thirty-Seventh Report to Congress on Lend-Lease Operations . . . Dec. 31, 1955, "Status of Nations" table, pp. 15-21.

¹²⁷ Ministries of finance as part of an executive branch ordinarily make grant or loan agreements, though they may be provided for in the terms of a political treaty, as was formerly frequent in the case of subsidies. For many years before 1920 China was a party to many financial transactions, mostly covered by treaty provisions, but substantively being agreements for governmental agencies to undertake some project such as railroad construction with funds furnished by the foreign government directly or to a contractor; see John V. A. MacMurray, *Treaties and Agreements with and concerning China, passim*. Since 1948 the Congress of the United States has appropriated funds to the President for distribution abroad by a governmental agency, latterly under the Mutual Security program. Allocation is controlled in varying details by statute, and the Defense Department and the International Co-operation Administration and its

funds, which makes loans to a government or its agency does so by "agreements" of a fiscal rather than a diplomatic quality.¹²⁸ Central banks, including the Federal Reserve System, have great freedom of action in relations with each other, all technical and non-diplomatic.¹²⁹ The International Bank for Reconstruction and Development makes loans to its member states, their political subdivisions and enterprises in those states; it registers loan and guaranty agreements made with states.¹³⁰ In these five types of intergovernmental loan agreements the difference between the treaty or contractual agreement, on analysis, depends upon the source of the authority under which it is made.

Documents resulting from the execution of treaties are not themselves treaties, unless so drafted, though a treaty provision may be carried out by a subsequent treaty. Execution or fulfilment of a treaty may be expressed in diplomatic correspondence, action by a body set up by it or by agencies already existing or established for the purpose. Diplomatic correspondence or arbitral awards relating to the interpretation or application of a treaty bear the same relation to the treaty that court decisions

predecessors distribute funds by means of "project agreements" (FOA-10-5) between one of them and an agency of a foreign government, which internally may act in virtue of an authorization deemed to be a treaty by it.

¹²⁸ Government corporations employing public funds have become a familiar phenomenon. Those which export money to foreign governments or their agencies may be illustrated by the Export-Import Bank of Washington (59 Stat. 526) which is to aid "in financing and to facilitate exports and imports and the exchange of commodities between the United States . . . and any foreign countries or the agencies or nationals thereof." It purchases its capital from the Treasury and extends a credit line to successful applicants, which include states, their corporate ministers, state corporations, their political subdivisions and municipalities. Loan agreements for the credits granted conform to the bank loan agreement, the agency rather than the government being the creditor. As agent for the United States, the Bank on Dec. 23, 1954, loaned \$100,000,000 to the European Coal and Steel Community, in virtue of the loan agreement of April 23, 1954 (T.I.A.S., No. 2945; 5 U. S. Treaties 525).

¹²⁹ Central banks engage in a variety of international financial transactions of a highly technical nature, and within their fields are in large measure autonomous as special agencies of governments distinct from ministries of finance. Laws establishing them grant them large powers in dealing with other central banks, with which they make agreements that are not regarded as treaties. For the international powers of the Federal Reserve Board and System, see 12 U.S.C. 348a. Cognate with such agreements may be mentioned the Monetary Agreement of Sept. 25, 1936 (15 State Dept. PUBL. RELEASES 267) between the governments of the United States, France and the United Kingdom, Belgium, The Netherlands and Switzerland adhering. Agreements by the International Monetary Fund with member states are treated similarly to those of central banks.

¹³⁰ The International Bank for Reconstruction and Development in general uses the form of agreement developed by the commercial banks of London and New York. It does not use the general bond employed by interstate instruments. Member states are parties to both loan and guaranty agreements, the latter underwriting loans to private enterprises. The Bank regards agreements with states as registrable under Art. 102 of the Charter, but goes no further. For samples of both types see U.N. Treaty Series Vols. 153-155. Loan Regulations Nos. 3 and 4 which are accepted *in toto* in agreements are registered, and an office memorandum discusses the registrability of various related or supporting documents.

and administrative regulations bear to a municipal law. Numerous matters handled by treaty require caretaking by a continuing or expert body; the functions and powers of these bodies are defined in the instruments. The bodies produce decisions which implement the treaty but are seldom made an integral part of it.¹³¹

Documents enabling the negotiation and validation of treaties are not treaties in principle. Full powers are a personal paper, exhibited and retained by the individual; credentials are addressed to the accrediting entity; other powers attach to the office and are not exhausted in a treaty transaction. Documents relating to entry of a treaty into force, exchange of ratifications, deposit of accessions, communication of reservations, etc., are parts of the file of each government for bilateral treaties or of the depositary for multilateral treaties; their content is attested to those concerned, but they are not usually circulated as documents. There are exceptions, such as a *procès-verbal* of deposit of ratifications of a multilateral treaty, which specifies that it shall enter into force when certain states have ratified.¹³² Much of the data referred to is included in the Presidential proclamations by which treaties of the United States are published.

Political subdivisions of states do not properly make treaties, though they may make "agreements" in some instances. There are exceptions. Swiss Cantons, by Article 7 of the Swiss Constitution, may conclude between themselves "conventions on subjects of legislation, administration or justice," not repugnant to the Constitution or rights of other Cantons, and by Article 9 "retain the right to conclude with foreign states treaties on matters concerning public economy, relations of vicinage or police."¹³³ The Soviet revision of the U.S.S.R. Constitution in February, 1944, granted the Republics the right to make "agreements" with neighboring states (Article 18A), "treaties" being reserved to the Union (Article 14a). Interstate compacts in the United States are made with the consent of Congress and in some instances may include Canadian Provinces.¹³⁴

¹³¹ Only suggestions of the scope of this type of document can be given here. The International Joint Commission (Art. VIII, Convention on U. S.-Canadian Boundary, Jan. 11, 1909) and the Alaskan and Mexican Boundary Commissions illustrate bilateral bodies. The Conference of Ambassadors (The Treaty of Versailles and After, pp. 7-8 and *passim*, State Dept. Pub. 2724 or 2757), which adopted 2,957 resolutions, and the Council of the North Atlantic Treaty Organization (Art. 9, Treaty, 34 U.N. Treaty Series 243; T.I.A.S., Nos. 1964, 2390) illustrate plurilateral implementing organs. The functions of the organs of the specialized agencies of the United Nations and the specific regulatory powers given to the International Consulting Committees of the Telecommunication Union and to the Congress of the World Meteorological Organization illustrate the sub-treaty management of a field on the multilateral level; see comment on Regulations, *supra*.

¹³² For example, the *procès-verbal* to the Protocol Relating to Military Obligations in Certain Cases of Double Nationality, The Hague, April 12, 1930, 178 L.N. Treaty Series 227; 4 Treaties, Conventions, etc. 5261.

¹³³ Max Huber, "The Intercantonal Law of Switzerland," 3 A.J.I.L. 62 (1909); Harvard Research, Law of Treaties, 29 A.J.I.L. Supp. 700 (1935).

¹³⁴ The Northeastern Forest Fire Protection Compact, 63 Stat. 271. The Act of May 27, 1955 (69 Stat. 66), on mutual aid in fire protection authorizes agreements with "any governmental entity or public or private corporation or association which main-

Concordats concluded between the Pope as head of the Holy See and states are not treaties, but the Pope as head of Vatican State has the capacity to make treaties and a concordat concluded by him in that capacity would be a treaty.¹³⁵

International organizations set up by treaties between states have the capacity to make treaties in executing their constituent functions, but have not the power to transmit that capacity beyond their own subsidiary agencies. Thus the Secretariat declined to register agreements between the United Nations and national committees for the United Nations Appeal for Children campaign.¹³⁶

Agreements between states and international organizations which were not intergovernmental, such as the International Tuberculosis Campaign and the International Committee of Military Medicine, or which were not invested with treaty-making capacity by the inter-governmental agreements constituting them, such as the International Patents Institute, were not registered.¹³⁷

The area of foreign relations lying between policy determination and treaty-making is a difficult one to explore, but the line should be sharply drawn to keep separate subjective political positions and objective legal obligations. The Secretariat of the United Nations says:

Minutes of meetings between the representatives of Governments, where a majority of items minuted involved observations of fact, explanations, statements of views or notes of matters left for further consideration, were not considered to constitute, in themselves, a treaty or international agreement in the sense of the Charter.¹³⁸

That statement suggests that someone has tried to register conference proceedings, leaving to the Secretariat the responsibility for sorting out what was intended to be of treaty quality. No one can object to that description of the type of papers that do not "in themselves" constitute treaties, but the matter can be spelled out a little more fully:

Travaux préparatoires, of course, are not part of a treaty, and are used for its interpretation only when necessary to get its meaning.¹³⁹

Final Acts of conferences are treaties or parts of treaties only insofar as they can be legally related to treaty instruments contained in them or concluded by the conferences.

Communiqués, joint statements, protocols of proceedings of meetings are not themselves treaties, though they may contain instruments which the participants decide to treat as such. Agreements or declarations

trains fire protection facilities in any foreign country." Under the Bridge Act (41 Stat. 84), several international bridges have been built.

¹³⁵ Harvard Research, Law of Treaties, 29 A.J.I.L. Supp. 702-703 (1935).

¹³⁶ 5 Repertory of United Nations Practice, Art. 102, par. 31 (a) and (b).

¹³⁷ *Ibid.*

¹³⁸ *Ibid.* par. 31 (e).

¹³⁹ Edvard Hambro, The Case Law of the International Court, citations nos. 57-70. The minutes of interpretation accompanying the Treaty of Friendship, Commerce and Navigation with Ireland, Jan. 21, 1950 (1 U. S. Treaties 785) are an example, as are the papers printed with the French Convention on Double Taxation, June 22, 1953 (Sen. Exec. J., 84th Cong., 2d Sess.).

tions at such meetings to take action or pursue a course are decisions of policy and are *travaux préparatoires* only if they result in treaty provisions.¹⁴⁰

The principle that only the entity responsible for the conduct of foreign relations makes treaties precludes dependent territories and protectorates from being independent parties to a treaty:

Agreements between states (or international organizations) and governments of dependent territories were considered as international agreements for the purpose of Article 102 only if it was possible to establish that the agreement concerned was formally binding on the state responsible for the conduct of [its foreign relations as] a party to the agreement.¹⁴¹

* * * * *

Resolutions, adopted by the Assembly of a specialized agency in the performance of its functions pursuant to the provisions of the Constitution of the agency concerned, were not considered as subject to registration.¹⁴²

A decision of an organ of the United Nations taken in virtue of a treaty provision is "not considered as an international agreement requiring registration."¹⁴³

Resolutions and recommendations of the organs of international organi-

¹⁴⁰ The Declaration of Four Nations on General Security, Nov. 1, 1943, of the Moscow Conference of Foreign Ministers as a directive resulted in the Dumbarton Oaks Conversations; the Yalta decision on a Security Council voting formula became an instruction to the delegations of the participants at Yalta, who succeeded in incorporating it in the Charter as Art. 27.

The much-discussed agreement regarding entry of the Soviet Union into the war against Japan, signed by Stalin, Roosevelt and Churchill Feb. 11, 1945, was defined in an aide-mémoire of the United States to the Japanese Government Sept. 8, 1956 (35 Dept. of State Bulletin 484) thus: "the United States regards the so-called Yalta agreement as simply a statement of common purposes by the then heads of the participating powers, and not as a final determination by those powers or of any legal effect in transferring territories." The agreement was published by Secretary of State Byrnes as Exec. Agr. Ser., No. 498 and was carried over at 59 Stat. 1823.

¹⁴¹ 5 Repertory of United Nations Practice, Art. 102, par. 31 (d).

¹⁴² *Loc. cit.* par. 31 (f).

¹⁴³ Annex XI, par. 3, of the Treaty of Peace with Italy, Feb. 10, 1947 (49 U.N. Treaty Series 215), provided that the parties would accept the recommendations of the General Assembly on the disposal of the former Italian colonies. Resolution 289 (IV), Nov. 21, 1949, set up Libya to be an independent and sovereign state by Jan. 1, 1952; provided that in 10 years Italian Somaliland should be an independent sovereign state, being administered in the interim period by Italy under the international trusteeship system; and that Eritrea should be placed under a commission which would determine the wishes of the inhabitants as well as the claims of Ethiopia for access to the sea. Subsequently resolutions 390 (V), 515 (VI), 617 (VII) and 855 (VIII) implemented what constituted sovereign acts, none of which was considered a treaty.

The Council of Foreign Ministers, in preparing the Italian treaty, proposed to assign certain duties to the Security Council, which accepted the charge by resolution of Jan. 10, 1947. The Secretariat held that there was no indication that the Security Council "intended to conclude a separate international agreement on behalf of the Organization." 5 Repertory of United Nations Practice, Art. 102, par. 31 (g).

zations—the Assembly and Council of the League of Nations, the General Assembly, Security Council, Economic and Social Council and Trusteeship Council of the United Nations—are not treaties but are limitatively legal obligations of the Member States as international acts. As consensual decisions they engage the good faith of Member States, each of which is entitled to assume acceptance by the others at least until notified otherwise.¹⁴⁴

Statements of aims or aspirations, however important in themselves, are not treaties,¹⁴⁵ not expressing legal obligations.

Agreements on particular points are not of treaty quality until incorporated in such an instrument or individually formalized.¹⁴⁶

Agreements in meetings to do something in the future or to make effective certain provisions constitute political promises, without treaty quality. Many actual *pacta de contrahendo*, agreements to agree, do exist and often create difficulties of realization by reason of changing events unforeseen at the time of their conclusion.

This list of documents that should not be regarded as treaties is suggestive rather than exhaustive. Independent states possess free will and are able to put into treaty form anything they can agree to. Policy is flexible; the treaty structure is precise. A state is therefore well advised to make fully clear what it is willing to be bound by under the rules of law and what it proposes to deal with by argument and accommodation.

¹⁴⁴ Writing of the adoption of the Stimson doctrine of non-recognition by the Assembly of the League of Nations on March 11, 1932, the late James L. Brierly states: "... it is certainly not lightly to be departed from, and ordinary decency requires that it should not be departed from without notice to and consultation with the other co-operating members" (16 Brit. Yr. Bk. of Int. Law 160 (1935)); F. Blaine Sloan, "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations" (25 *idem.* 1-34 (1948)).

¹⁴⁵ Reference is made to the Atlantic Charter, Aug. 14, 1941, the Pacific Charter, Sept. 8, 1954, and the Declaration of Washington, Feb. 1, 1956. The Atlantic Charter, however, acquired treaty status as an annex to the Declaration by United Nations, Jan. 1, 1942, which was in force as an alliance against the Axis Pact of Sept. 27, 1937, until the latter's dissolution with the surrender of Germany May 7, 1945.

¹⁴⁶ In 1929 the Economic Committee developed a formulation of the most-favored-nation clause which was approved by the Assembly of the League of Nations and subsequently incorporated in trade agreements of the United States and other countries.

EDITORIAL COMMENT

TREATIES, THE SENATE, AND THE CONSTITUTION: SOME CURRENT QUESTIONS

It may be useful to record briefly in the JOURNAL three relatively unpublicized contemporary problems of treaty law. These developments present unusual aspects of the relationship of the Senate's treaty powers to the making or changing of Federal statutory law. It may well be that the ways in which these problems, or some of them, are approached and solved may come to have a place in the Constitutional history of the treaty power in the United States.

1. *Senator Bricker and the Conservationists: The Senate and the Courts*

A publication of the Wildlife Management Institute reported recently¹ a correspondence with Senator Bricker regarding the effect of his proposed Senate Joint Resolution 3 upon the Migratory Bird Treaty between the United States and Canada. The Senator pronounced himself as opposed to "any amendment which would make it impossible for the United States to fulfill its obligations under that treaty" and continued:

The Migratory Bird Treaty would not be affected by Section 1 because it was made in pursuance of the Constitution; involved a subject of genuine international concern; and did not conflict with any constitutional provision. The Migratory Bird Treaty required implementing legislation by both Houses of Congress. Congress provided that legislation when it passed the Migratory Bird Treaty Act. If Section 2 of my amendment had been in effect at that time, the same legislation could have passed and that legislation would have been valid even though the power to enact such legislation might not have existed in the absence of the treaty. Section 3 of the amendment deals only with international agreements other than treaties.²

It is interesting to note that Senator Bricker thus seems to accept the result of *Missouri v. Holland*³ as of continued validity under an altered Constitution. This would certainly seem to mark a difference in viewpoint between Senator Bricker and those supporters of his earlier proposals who have concentrated their criticism upon the "centralist" philosophy of the *Holland* decision.

However, the real importance of the Senator's reported answer lies in what it implies with respect to the interpretation of the Constitution, should his amendment become a part of it. It will be recalled that before the Migratory Bird Treaty and its implementing legislation, a Federal legislative effort to deal with the problem without a treaty had been struck

¹ Outdoor News Bulletin, Vol. 11, No. 6, March 29, 1957, issued bi-weekly by the Wildlife Management Institute, 709 Wire Bldg., Washington 5, D. C.

² *Ibid.*, p. 2.

³ 252 U. S. 416 (1920).

down by the lower Federal courts.⁴ The opinion of Holmes, J., in the *Leland* case turned on the difference in language between the supremacy clause for Acts of Congress ("in pursuance of the Constitution") and for treaties ("made under the authority of the United States"). It has been commonly assumed that Senate Joint Resolution 3,⁵ Section 1, which provides that "a treaty or other international agreement not made in pursuance of this Constitution shall have no force or effect," had meant to remove the differentiation now present in the supremacy clause between "treaty law" and ordinary Federal legislation. In his answer to the conservationists Senator Bricker suggests another concept of "in pursuance" one which would not overrule *Missouri v. Holland*.

What branch of the Government is to decide whether a treaty and its implementing legislation are "in pursuance" of the Constitution and hence valid, or not "in pursuance" and hence invalid, and by what test? The normal answer to this question, under the generality of Section 1 of Senate Joint Resolution 3 would be: "The Supreme Court of the United States, *Marbury v. Madison*, etc." But Senator Bricker's answer to the conservationists does not mention the principle of judicial review. Perhaps he meant only to give his view of what he understands the proposal to mean. Perhaps the suggestion is that the legislative history of Senate Joint Resolution 3 will make his point of view on the scope of the treaty power clear—certainly clearer than any such "liberal" viewpoint has previously been made in hearings on the predecessors of Senate Joint Resolution 3.

Perhaps Senator Bricker's reply to the conservationists merely gives his view that Federal regulation which once could only have been upheld under the treaty power ("authority of the United States") can now be supported with assurance under the commerce power; i.e., the Supreme Court probably would hold now that a Federal statute (with or without a treaty) dealing with migratory bird regulation would be "in pursuance" of the Constitution. If this is the case, then those who (unlike Senator Bricker) object to the Federal regulation of migratory birds and other like extensions of Federal power might well query what Article of the

⁴ The opinion in *Missouri v. Holland* cites *U. S. v. Shauver*, 214 Fed. 354 (1914) and *U. S. v. McCullagh*, 221 Fed. 288 (1915), both as supported by the rationale of *Green v. Connecticut*, 161 U. S. 519 (1895).

⁵ 85th Cong., 1st Sess., introduced Jan. 7, 1957, read twice and referred to the Committee on the Judiciary. The operative portions of this latest version of the so-called "Bricker Amendment" read:

"Section 1. A provision of a treaty or other international agreement not made in pursuance of this Constitution shall have no force or effect. This section shall not apply to treaties made prior to the effective date of this Constitution.

"Section 2. A treaty or other international agreement shall have legislative effect within the United States as a law thereof only through legislation, except to the extent that the Senate shall provide affirmatively, in its resolution advising and consenting to a treaty, that the treaty shall have legislative effect.

"Section 3. An international agreement other than a treaty shall have legislative effect within the United States as a law thereof only through legislation valid in the absence of such an international agreement."

[Section 4 deals with voting procedure in the Senate on advising and consenting to treaties.]

Constitution ought to be amended, the commerce clause or the supremacy clause.⁶

On the face of it Senator Bricker seems to be laying down a new, three-fold (or possibly fourfold) test for the constitutionality of a treaty under the proposed amendment, and he appears to be applying the test as a part of the legislative history of Senate Joint Resolution 3. Some portions of the suggested test have been mentioned in *dicta* by the Supreme Court ("conflict with any Constitutional provision"), and other portions of the test have been asserted to be good law by commentators and argued in cases ("subject of genuine international concern").⁷ Senator Bricker adds to these his interpretation of "in pursuance of the Constitution" and the intimation that a treaty which specifically provides that it shall not be self-executing is of a somewhat higher order of Constitutional acceptability.⁸ The foregoing opens the questions: (a) Where and in what detail should the tests be laid down, and (b) What institution (or institutions) of government shall have the power to rule specifically on the constitutional acceptability of particular treaties? These are fascinating and important questions.

2. *New York and Niagara Power: The Senate and the House of Representatives*

Under the Federal Water Power Act of 1920⁹ the Federal Power Commission is given jurisdiction to license power projects on any stream over which there is Federal jurisdiction, except such streams as Congress might expressly remove from the jurisdiction of the Federal administrative agency. The Senate had referred to it for its advice and consent a new treaty between the United States and Canada, signed in 1950, providing for the joint development of the scenic values of Niagara Falls and for an increased utilization of water flow for power production purposes. The Senate qualified its consent to the treaty by attaching a reservation:

The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States' share of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress.¹⁰

⁶ U. S. Constitution, Art. VI, 2nd par.

⁷ Charles Evans Hughes, as President of the American Society of International Law, 1929 Proceedings A.S.I.L. 194, as recorded in Bishop, *International Law* 83 (1953); see also part 2 of this editorial.

⁸ Senator Bricker's reference to the fact that the Migratory Bird Treaty was not self-executing but was implemented may imply that Sec. 2 of his proposal, as well as Sec. 1, is to be applied retrospectively as well as prospectively. See the last sentence of Sec. 1 (note 5 above) and compare the quotation from the Senator's statement to the conservationists, *supra*, p. 606.

⁹ Now part of the Federal Power Act, codified, 16 U.S.C. § 791a, *et seq.*

¹⁰ Treaty between the United States and Canada Concerning Uses of the Waters of the Niagara River, Feb. 27, 1950, 1 U.S.T. 694, 699.

The Power Authority of the State of New York applied to the Federal Power Commission for a license covering the new flow made available under the treaty, contending that the Senate's action was incompetent to remove the Niagara (as to the new water fall) from the jurisdiction of the Commission. The Federal Power Commission dismissed the application on the ground that it as a creature of Congress could not resolve the disputed issue of its jurisdiction raised by the Senate reservation.¹¹ Review is now pending before the Court of Appeals for the District of Columbia.

A key issue in the case is whether the Senate reservation suffices to bring into operative effect (with respect to the substance of the reservation) the familiar principle of United States treaty law that conflicts between Acts of Congress and treaties are resolved in favor of the latter in time. The New York Power Authority contends that the Senate reservation does not relate to a matter of international concern and hence cannot partake of the treaty power in relationship to prior legislation. The power of the Senate has been defended.¹²

Thus, once again the substantive content of "of international concern" comes into issue, as does the rôle of the courts *versus* other institutions of government with respect to the making of the determination as to a particular treaty or reservation. Issues such as these may well be settled soon by judicial decision, and further comment while they are *sub judice* will be foregone here.

There is, however, another question, one which does not seem within the ambit of the current litigation. It is the question of the respective rôles of the Senate and the House of Representatives in the law-making process, where under the Constitution (now or as amended) the Senate has a treaty function which the House does not have, but where the House can never legislate alone. There is an interesting parallel between the assumptions of the Senate in the case of the Niagara reservation and Section 2 of Senate Joint Resolution 3.¹³ The latter formulation for Constitutional change gives the Senate the power to prevent a self-executing treaty from superseding a prior inconsistent Act of Congress; it also permits the Senate to do just the opposite and by two-thirds vote provide that a treaty shall have self-executing legislative effect.

We know from precedent and the practices of treaty negotiators that treaties as signed do not always make it entirely clear whether they are intended to be self-executing or not; hence the "grammar test" of the United States Supreme Court.¹⁴ Heretofore instances in which the Senate by reservation has attempted to decide the issue have been rare. The rôle of the courts has become well established.

Should the Senate by virtue of Constitutional amendment be given a

¹¹ JA 33-42, Nov. 30, 1956, dismissing application for license in project No. 2216.

¹² Henkin, "The Treaty Makers and the Law Makers: The Niagara Reservation," 56 Columbia Law Rev. 1151 (1956).

¹³ The parallel does not lose in interest when one reflects that very likely the Senators who sponsored the Niagara reservation do not see eye to eye with Senator Bricker on his proposals to change the treaty power.

¹⁴ *Robertson v. General Electric Co.*, 32 F.2d 495 (4th Cir., 1929); *Foster and Elam v. Neilson*, 2 Peters 253 (1829); *U.S. v. Percheman*, 7 Peters 51 (1833).

clear power to do that which is uncertain and disputed, namely, the competence to determine as between a prior bicameral act and its own unicameral act as to which is the law? Certainly the amendment would generally resolve in favor of Senate power what is now at issue for a narrower situation in the litigation between the State Power Authority and the Federal Power Commission.

Despite the lack of any concrete evidence that the House of Representatives does concern itself about the steady increase of Senate power *de facto* throughout the field of lawmaking—an increase sometimes almost as much at the expense of executive power as of the legislative power of the “popular” branch of the national legislature—the policy question, and it is a big one, remains for decision: How much actual legislative power is it wise to lodge in one House at the expense of the other, either by Constitutional change or by toleration?

3. *World War II and the Italian Extradition Treaty: The Senate, the Executive and the Courts*

Argento resisted extradition to Italy,¹⁵ arguing that no valid international agreement existed under which he could be extradited, because: (a) World War II extinguished, rather than merely suspended, the Extradition Treaty of 1868, as amended; (b) Article 44 of the Italian Peace Treaty, providing that such bilateral treaties as each of the Allied and Associated Powers should desire “to keep in force or revive” should be notified to Italy, and the ensuing notification by the U. S. Department of State were ineffectual since the notification was not submitted to the Senate for its approval.

The Circuit Court of Appeals for the Sixth Circuit held against Argento. It accepted the proposition that if war had extinguished the Extradition Treaty, its revival under Article 44 of the Italian Peace Treaty without Senate concurrence would not have been possible. Then, coming to grips with that “subject in respect of which there are widely divergent opinions,” the effect of war on treaties, the court found that war merely suspended an extradition treaty. Remarking that the question of the effect of war on an extradition treaty seemed to be one of first impression and that neither of the classifications of *Karnuth v. United States*¹⁶ fitted, the court found the solution to its problem in “. . . the actual conduct of the two nations involved, acting through the political branches of their governments.” The actual conduct of the political branches of the American and Italian governments indicated suspension and revival, not extinguishment and remaking, it was found. The court added:

. . . There is, to be sure, a certain circuitry of reasoning in deciding that the parties did not need to make a new treaty of extradition for the reason that they did not in fact make one. Yet it is exactly that pragmatic and cautious approach that, if the question is doubtful, the authorities enjoin. *Terlinden v. Ames*, 184 U. S. 270. . . .

¹⁵ *Argento v. Horn*, 241 F.2d 258 (6th Cir., 1957); digested below, p. 634.

¹⁶ Political treaties, on the one hand, and treaties for wartime conduct, boundary and private rights to lands on the other, 279 U.S. 231, 236 (1929).

One factor mentioned by the court probably has greater weight than its mere mention might suggest: The court found the Senate had ratified Article 44 of the Italian Peace Treaty without raising any question or expressing any point of view about the notification procedure. Suppose the Senate had in giving its consent to the Peace Treaty recorded its "understanding": (a) that war terminates extradition treaties; or, (b) that the list of treaties notified under Article 44 would have to receive Senate concurrence. The approach of the opinion suggests that either Senate action would have changed the picture markedly. It is also of possible significance that court and counsel assumed throughout that as to extradition the international agreement which would justify the power would have to be a Senate-consented type of international agreement:

That the Executive is without inherent power to seize a fugitive criminal and surrender him to a foreign nation has long been settled. *Valentine v. United States, ex rel. Neidecker*, 1926, 299 U.S. 5...; see *Factor v. Laubenheimer*, 1933, 290 U.S. 276 . . .

While Congress might conceivably have authorized extradition in the absence of a treaty it has not done so. The law is clear . . .

This recalls another area in which the executive agreement had been foreclosed.¹⁷ It is also an area where in practice the House has had no say, except to provide for the implementation of the action agreed between the Executive and the Senate.¹⁸

But under this decision the courts still have the last say on some rather important questions. Query, the extent to which this judicial rôle could have been foreclosed or cut down by the Senate's use of its power to qualify its consent to treaties by means of reservations, understandings and interpretations.

Taken together, the three contemporary situations suggest that the questions for discussion, should proposals for Constitutional change in the treaty power again come up for serious attention, might well include questions other than those principally discussed in 1953-55.

COVEY T. OLIVER

SOME QUESTIONS OF LEGAL RELATIONS BETWEEN COMMONWEALTH MEMBERS

The emergence of Ghana as the ninth member of the British Commonwealth and the eighty-first Member of the United Nations draws attention anew to a unique and continuing experiment. There is a prospect of four additional members of the Commonwealth in the near future.¹ Already

¹⁷ Editorial, "Executive Agreements and Emanations from the Fifth Amendment," 49 A. J. I. L. 362 (1955).

¹⁸ Cf. Arthur Krock, editorial on the proposed Senate "understanding" on the International Atomic Energy Agency Treaty, New York Times, June 18, 1957, p. 32, col. 5. Mr. Krock supports the use by the Senate of "understandings" that treaties be not self-executing as a simple and desirable alternative to Senator Bricker's proposed amendment. But see the discussion, *infra* Part 3.

¹ Malaya, the British West Indies, Nigeria, and the Federation of the Rhodesias and Nyasaland.

including about one fourth of the earth's people (four fifths of the total number in the Commonwealth now being Asians), the associated states proceed in their co-operation and understandings within the wider framework of international law. In their relations *inter se* they are free to maintain special arrangements or to assimilate such rules as apply between them to ordinary rules of international law.

Many of the relationships between Commonwealth members have invited analysis by specialists in international law, as, for example, those involving nationality, judicial assistance in such a matter as extradition, diplomatic protection, and most-favored-nation treatment. In the present comment it is proposed to consider but two aspects of a very large subject: (1) the position of the Commonwealth members with respect to judicial settlement of their disputes *inter se*, and (2) some recent developments concerning jurisdictional immunities of the official representatives which the Commonwealth members exchange with each other. The first of these touches the question of an obligatory international jurisdiction. The second involves practice in the application of long-standing rules of customary international law.

I

When, about a decade after the launching of the League of Nations, the British Dominions faced the question of accepting the Optional Clause in the Statute of the Permanent Court of International Justice, they adopted a common policy with respect to disputes *inter se*. The latter, by the view which prevailed, were not international disputes within the meaning of the Statute, since the relations between the autonomous Dominions (or between any of them and the United Kingdom) were *not international*.² An Imperial Conference of 1926 had thought it would then be premature for the Dominions to accept the Optional Clause. By the understanding reached, there was not to be a move in this matter by any Dominion before discussion with the others. Canada initiated such discussion in 1929. The sequel was acceptance of the Optional Clause by all the Dominions. All except the Irish Free State, however, reserved disputes *inter se*. The latter were, by the express wording of acceptances, to be settled in such manner as the parties had agreed upon or might agree upon.³

Up to the present time there appears to have been no substantial change in this attitude. Of the eight states which composed the Commonwealth just before the admission of Ghana, six had in their acceptances of the Optional Clause excluded disputes with any other member of the Commonwealth.⁴ Ceylon had not accepted the Clause, and Pakistan, while not

² See, for example, the remarks of Sir Cecil Hurst at a meeting of jurists in 1929. Minutes of the Committee of Jurists on the Statute of the Permanent Court of International Justice, League of Nations Doc. C. 166.M.66.1929.V, pp. 71-72.

³ Cmd. 3452.

⁴ India's most recent declaration excludes "disputes with the Government of any country which on the date of this Declaration is a member of the Commonwealth of

specifically excluding such disputes, had specified reciprocity, which would presumably preclude Pakistan's being cited by a Commonwealth member which had made a specific reservation of disputes between it and another Commonwealth member.⁵

As early as 1929 an Imperial Conference had recommended that there be a Commonwealth tribunal. More explicit conference proposals of 1930 looked to a plan whereby there would be, not a continuing machinery such as a permanent court, but boards chosen by the disputant states for the adjudication of particular disputes. All of the persons composing such boards were to be from within the Commonwealth. In the absence of "general consent" to obligatory arbitration, reference of any dispute was to be voluntary. The plan was to apply only to "justiciable" disputes.⁶ Even within these limitations there has resulted no construction such as the Imperial Conference seems to have contemplated.

As Members of the United Nations, the Commonwealth states are, of course, bound by the pacific settlement provisions of the Charter, in relation to each other as well as in relations with other Members of the United Nations. In the field of air navigation, Commonwealth members appear in their treaties *inter se* to have included compromissory clauses, but even these are primarily in terms of procedures which the parties shall agree upon. In some of these commitments, however, is the rule that if the parties cannot reach agreement as to composition of a tribunal, either of them may submit the dispute for decision by "any tribunal competent to decide it which may hereafter be established within the International Civil Aviation Organization or, if there is no such tribunal, to the Council of the said Organization."⁷

Of the disputes which have developed between Commonwealth members since the establishment of the United Nations, that concerning Indians in the Union of South Africa and the Kashmir dispute are doubtless the most serious. Early in the history of the United Nations the Union of South Africa was agreeable to having the first of these referred to the International Court of Justice for an advisory opinion as to whether the

Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree."

There is some variation in the language of the declarations by the respective Commonwealth states. Texts in I. C. J. Yearbook, 1955-1956, pp. 184-189, 194.

⁵ On the legal effect of reciprocity in relation to other reservations, see C.H.M. Waldock, "Decline of the Optional Clause," 32 Brit. Yr. Bk. of Int. Law 244, 254-261 (1955-1956).

⁶ Imperial Conference, 1930: Summary of Proceedings, pp. 22-24; Robert A. MacKay, "The Problem of a Commonwealth Tribunal," 10 Canadian Bar Review 338, 344 (1932).

⁷ Agreement in the form of an exchange of notes between the United Kingdom and Canada concerning the establishment of air communication between Canada and United Kingdom territories in the West Atlantic and Caribbean areas, signed July 17, 1947, Art. 9 (b), 28 U.N. Treaty Series 3. Compromissory clauses in comparable form occur in at least fifteen agreements. In four of these (Pakistan-India, *ibid.* 143, Australia-Pakistan, 35 *ibid.* 23, India-Australia, *ibid.* 83, and New Zealand-Canada, 77 *ibid.* 239) there is provision whereby, as a last resort, disputes may be referred to the International Court of Justice.

question was one of domestic jurisdiction. The move did not succeed, the Soviet Union's spokesman suggesting that to treat the question as a legal matter would tend to "minimize the political importance and weaken the prestige of the United Nations."⁸ There have been various suggestions of a possible rôle for the International Court in the Kashmir dispute. One of the most recent, by a well-known British jurist, was to the effect that the fundamental questions involved could be decided by the Court.⁹ As has been suggested above, however, there is apparently no existing commitment of India and Pakistan which would legally bind them to refer the dispute to this tribunal.

II

In the matter of representation, and in particular the immunities of official agents, the Commonwealth states have recently provided an illustration of co-operation along agreed lines. In this instance the situation of Eire, which is no longer a member of the Commonwealth, invited special attention.

The development within the British Empire, and later in the Commonwealth, of the practice of sending high commissioners (as also the use of agents-general from Provinces) has been traced by various publicists.¹⁰ The office of High Commissioner apparently dates from 1880, when Canada had such a representative in London. Only after the first World War did the United Kingdom send high commissioners to the respective Dominions (the Governors General having functioned for such purpose of representation as was needed before that time).¹¹ When Eire ceased to be a member of the Commonwealth, the nations which remained in that association began to send to Dublin official representatives with ranks determined by ordinary diplomatic usage. For some purposes of legislation in Commonwealth states, however, the Republic of Ireland continues to be regarded as if it were not a "foreign" state in the full sense of that term. In the matter of their reception, high commissioners going to the United Kingdom are distinguished from ambassadors sent from other countries; the Commonwealth Relations Office, rather than the Foreign Office, provides a channel of communication.

Inevitably the question has arisen whether, and in what respects, the

⁸ General Assembly, 1st Sess. (Pt. II), Official Records, Joint Committee of the First and Sixth Committees, Nov. 21-30, 1946, pp. 1-50, at p. 29.

⁹ In a letter to *The Times* (London) of March 5, 1957, Sir Ivor Jennings wrote in part: "The fundamental question is whether the State of Jammu and Kashmir is lawfully included among the territories of the Union of India by section 1 and the First Schedule of the Constitution of India. If the answer is in the negative, Kashmir is an independent state and the troops should be withdrawn. If it is in the affirmative, Pakistan would no doubt argue that the incorporation is temporary and conditional on the decision of the people after troops have been withdrawn. This question also could be decided by the International Court."

¹⁰ See, especially, Heather J. Harvey, *Consultation and Cooperation in the Commonwealth*, Ch. VIII (1952); G. P. deT. Glazebrook, *A History of Canadian External Relations 150-151* (1950); Canada, *Sessional Papers*, 1880, No. 105.

¹¹ Heather J. Harvey, *op. cit.* 181, 184.

high commissioners which Commonwealth members accredit to each other are in fact different from fully titled diplomatic representatives which each of them exchanges with "foreign" states. Some bases for answers are to be found in legislative policy, much resulting from agreement of the Commonwealth members among themselves. In the matter of taxation and customs charges, United Kingdom Finance Acts of 1923 and 1925 placed high commissioners from the Dominions in as favorable a position as ambassadors accredited to Great Britain. Each Dominion had taken a similar step (with respect to high commissioners which it received) by 1948. In that year, following a Conference of Prime Ministers, came the elevation of high commissioners to as favorable a position as that of ambassadors of foreign states in the matter of precedence. It remained to extend to them immunities equal to those which such ambassadors enjoyed. The means was to be legislation, upon the general lines of which there was agreement in principle through an exchange of telegrams in 1949. The fact that in relation to each other the Commonwealth members did not regard themselves as *foreign* states was a stated reason for the means used.

Legislation of the Union of South Africa in 1951,¹² of the United Kingdom, New Zealand and Australia, respectively, in 1952,¹³ and of Canada in 1954,¹⁴ implemented the understanding. Discussion of the measures in the respective parliaments elicited various comments on the significance of what was proposed. While the legislation does not appear to have been considered controversial, some of the comments were not completely enthusiastic. Thus, in the British House of Commons there were suggestions that "when we place relations with the Commonwealth on something of a more formal basis and make our relations with them similar to those with *foreign* countries, we appear to detract from the family relationship which we have with the Commonwealth";¹⁵ that the Bill was one of the the "progeny" of the British Nationality Act of 1948;¹⁶ and that (since the ambassador from the Irish Republic was to be a beneficiary of the legislation) it seemed "in order to obtain the privilege of being an ambassador, the ambassador of Ireland is to be treated as a High Commissioner."¹⁷ One speaker observed that this was the first time the expression "Commonwealth" (as distinct from "Commonwealth ter-

¹² Diplomatic Privileges Act, 1951, Statutes of the Union of South Africa, 1951, p. 1204. This Act did not make specific mention of any other countries, but defined "diplomatic agent" to include high commissioner, ambassador, etc.

¹³ Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, Halsbury's Statutes of England (2nd ed.), Vol. 32, p. 45; An Act to Confer Certain Immunities on the Representatives in New Zealand of Commonwealth Countries and the Republic of Ireland, Statutes of New Zealand, 1952, Vol. II, p. 1207; Diplomatic Immunities Act, 1952, Commonwealth Acts, Australia (1952), Vol. 50, p. 235. The last-mentioned Act did not specifically mention the Republic of Ireland.

¹⁴ Diplomatic Immunities (Commonwealth Countries) Act, Statutes of Canada, 1953-1954, Vol. I, p. 669. This Act does not refer specifically to Ireland.

¹⁵ Parl. Deb., Commons, 1951-1952, Vol. 494, cols. 2447-2448 (italics inserted).

¹⁶ *Ibid.*, col. 2454.

¹⁷ *Ibid.*, col. 2453.

ritories'') had occurred in statutes of the realm, and suggested that "innovations without necessity are always undesirable."¹⁸

While there was considerable variation from one Commonwealth state to another, the general purpose of this legislation was to accord to high commissioners (and, in the case of New Zealand and the United Kingdom, to the Irish ambassador) diplomatic immunities equal to those enjoyed by "envoys," and to place these immunities on a basis of reciprocity. What was done in effect was to provide through legislation for application of the international law standard. There had been in Great Britain, prior to the legislation of 1952, a report by an interdepartmental committee on diplomatic immunity (which related to law and practice in general, and contained no specific reference to Commonwealth relations).¹⁹ When the Australian legislation was under consideration, one member of Parliament expressed the opinion that "International law on the matter of diplomatic immunities still goes far beyond what is necessary to enable diplomats and members of their staffs to carry out their duties"; the "whole matter of international law on this subject," he thought, "should be altered."²⁰ In Canada, the Parliamentary Assistant to the Secretary of State for External Affairs admitted under questioning that no special legislation defined diplomatic immunities. He added that:

Such powers as are in existence are under the rules of international law and they are in fact applied by the Canadian courts. . . .²¹

Of the five Commonwealth members whose legislation has been noted above, two (Canada and New Zealand) included in the same Act provisions for immunities of persons performing consular functions. These immunities were, in the case of persons accredited from other Commonwealth states, to be as wide as those enjoyed by persons coming from foreign states. In the case of the Republic of Ireland, that country's Consular Conventions Act of 1954, while including a provision concerning reciprocity, made no specific reference to Commonwealth members; the legislation defined a "consular convention country" as "a country between which and the State a consular convention is in force dealing with some or all of the matters for which provision is made by this Act."²²

In the matter of diplomatic representation there developed in 1954, be-

¹⁸ *Ibid.*, Vol. 496, col. 1546.

¹⁹ Cmd. 8460. The Committee was to consider: "(1) Whether the law or practice of the United Kingdom affords to the Governments, Government Departments and other state organs of foreign States a wider immunity than is desirable or strictly required by the principles of public international law in regard to property (including ships), transactions, any other act capable of creating legal liabilities, or any other matter. (2) Whether the law or practice of the United Kingdom affords to persons possessing diplomatic immunity an immunity in any respect wider than is desirable or is strictly required by the principles of public international law. (3) What, if any, changes in the law of the United Kingdom the Committee recommends should be made having regard to its answers to questions (1) and (2) and to the question of reciprocity."

²⁰ Parl. Deb., Australia, Vol. 219, p. 1793.

²¹ H. of Com. Deb., Sess. 1953-1954, Vol. V, p. 5421. Cf. statement in British House of Lords, Parl. Deb., 1951-1952, Vol. 175, col. 581.

²² Acts of the Oireachtas, 1954, p. 67.

tween Australia and the Republic of Ireland, a difficulty concerning the form of address in the Letters of Credence for the Australian Ambassador to Ireland.²³ The difficulty resulted in Australia's being represented at Dublin, for the period immediately following this, by a *chargé d'affaires ad interim* rather than an ambassador.

III

Developments which have been noted concerning provision for settlement of disputes of Commonwealth states *inter se* and concerning representation suggest a firm and continuing will to maintain between these states closer ties than they have with "foreign" states. It is possible for a new state carved out of what has been British territory to decline membership in the Commonwealth, as did Burma, or to drop out of membership therein, as did Eire. For those electing to remain in their peculiar association, there is perhaps maintainable a sense of community which makes less necessary (than would otherwise be the case) the full network of formal arrangements which independent states ordinarily utilize between themselves. At the same time, the development of dangerous tensions between certain Commonwealth members raises questions of the possibly greater efficacy of international organization law as compared with a type of optional intra-family procedures. The granting by a Commonwealth member to diplomatic representatives of other Commonwealth states of immunities equal to those granted envoys of "foreign" states marks another step toward the full application of international law in the relations of Commonwealth states *inter se*.

ROBERT R. WILSON.

²³ See statement on "Australian Representation at Dublin," in Current Notes on International Affairs (Department of External Affairs, Australia), Vol. 25, No. 1 (Jan., 1954). It was reported that the Minister for External Affairs (Casey):

"... had made every possible effort, on behalf of the Australian Government, to secure agreement. The one point of disagreement was the form of address contained in the Letters of Credence. The Government of the Republic of Ireland had insisted that the letters must be addressed to 'The President of Ireland.' Unfortunately, Article 2 of the Irish Constitution states that 'the national territory consists of the whole island of Ireland, its islands and the territorial seas.' Letters of Credence of the chief diplomatic representatives of Australia are signed by the Queen. Mr. Casey said that neither the Australian Government nor he himself would consider asking the Queen to do something in her capacity as Queen of Australia which would embarrass her in her capacity as Queen of the United Kingdom and Northern Ireland. It was impossible for Australia to request her Majesty the Queen to sign Letters of Credence ... containing a phrase which would appear to throw doubt upon the validity of Her Majesty's title as Queen of the United Kingdom and Northern Ireland."

The Irish Minister for External Affairs (Aiken) was reported as having said, in January, 1954, that his Government had no intention of withdrawing the Irish Ambassador in Australia, as in the latter's case constitutional difficulties had not arisen. The Minister was also reported as referring to a compromise with the United Kingdom whereby the credentials of that country's Ambassador to Ireland were addressed to President O'Kelly personally, and as saying that this compromise (in connection with which he mentioned the partition of Ireland) was "no precedent for two countries which have no quarrel." Keesing's Contemporary Archives, March 13-20, 1954, p. 13466.

NOTES AND COMMENTS

THE UNITED STATES AT THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

In October, 1956, an Observer Delegation of the United States Government for the first time attended a session of the Hague Conference on Private International Law, which has as its purpose the progressive unification of the rules of private international law.¹ The event has been much noticed and merits attention for a variety of reasons, internal and international.

The Hague Conference, the history of which goes back to 1893,² has become a permanent institution more recently. It has a permanent Bureau at The Hague and is in session every four years in principle. Eighteen European nations and one non-European, Japan, are at present members of the Conference; that is, they have ratified the convention which gives the Conference its status.³ From the common-law side, the United Kingdom and Ireland belong to the Conference.

After the seventh session of the Conference, held in October, 1951,⁴ the suggestion was made to the United States Government that the United States accept membership in the Conference. The Government decided against joining, but responded favorably to the invitation to send observers to the next session of the Conference.

The Eighth Session, called for October, 1956, had on its agenda two conflicts questions relating to international sales of goods and one concerning maintenance obligations. Simplification of requirements of authentication for foreign public documents was also to be discussed. In the course of 1955, the Department of State approached a number of organizations, including the American Society of International Law, the American Branch of the International Law Association, the American Bar Association, the American Law Institute, and the National Conference of Commissioners on Uniform State Laws, with the question whether they would wish to suggest to the Department the names of individuals to attend the Eighth Session of the Hague Conference as observers, without expense to the Federal Government. As a result of nominations made, four individuals⁵

¹ Charter of the Hague Conference on Private International Law, Art. 1. 3 *Nederlands Tijdschrift voor Internationaal Recht* 99 (1956), 102 *U. of Pa. Law Rev.* 363 (1954).

² The references are collected in K. H. N., "The United States and the Hague Conferences on Private International Law," 1 *A. J. Comp. Law* 269 (1952).

³ See note 1 *supra*.

⁴ On this session, see Arthur K. Kuhn, "The Council of Europe and the Hague Conferences on Private International Law," 46 *A.J.I.L.* 515 (1952). A translation of the four draft conventions adopted at that session has appeared in 1 *A. J. Comp. Law* 275 (1952). Analysis in English: J. Offerhaus, "The Seventh Session of the Hague Conference on Private International Law," 79 *Journal du Droit Int.* 1071 (1952).

⁵ Messrs. Philip W. Amram, Washington, D. C.; Joe C. Barrett, Jonesboro, Ark.; Kurt H. Nadelmann, Cambridge, Mass.; Willis L. M. Reese, New York, N. Y.

were appointed, and attended the Conference as members of the United States Observer Delegation.

The Conference lasted three weeks. At the conclusion, four draft conventions were approved,⁶ dealing, respectively, with (1) the law applicable to transfer of title in international sales of goods; (2) the conditions under which the parties to an international sale of goods may agree to submit controversies to the exclusive jurisdiction of a selected forum; (3) the law to govern the measure of support owed a minor child; (4) recognition and enforcement of support decrees for the benefit of minor children. One of these conventions, on the law governing support owed a child, was signed immediately by seven governments.

The Conference also chose topics for future work. Among them are the law to govern the form of last wills (topic suggested by the British Delegation); re-examination of the old Hague conventions on questions of status; agency in the field of contracts; simplification, or elimination, of requirements for authentication of foreign public documents.⁷

The work of the Conference is well prepared in advance of the sessions. On the basis of questionnaires prepared by the Permanent Bureau, committees which meet at The Hague produce preliminary drafts. The member governments send in their observations on the drafts, and these observations are circulated at the time of the calling of the session of the Conference.

At the recent session, as at previous sessions, the member nations were represented by their experts on conflict of laws, law professors and law deans, members of their highest courts, legal advisers and other ranking law officers.⁸ The technical discussions were illuminating, and this may be said especially of the debates in the committee dealing with the difficult question of what law shall govern transfer of title in sales. Unanimity was not always obtained. On the subject of transfer of title, for instance, in order to meet objections raised by the Scandinavian and English delegates, the convention provides that signatories may make a number of specified reservations.

The American observers took a limited part in the debates. Upon request or on their own volition they advised on American law as it is. They refrained from taking sides on questions on which there was a division. As observers, of course, they did not vote. The debates, it may be noted, are in French, the official language of the Conference. English may be used—and was used occasionally. The Conference staff furnished a translation in such cases.

Toward the close of the Conference, the members of the United States Observer Delegation raised the question of possible advantages in having

⁶ Text of the Final Act, with the conventions, in 45 *Revue Critique de Droit International Privé* 746, and 39 *Rivista di Diritto Internazionale* 425 (1956). English translation of the conventions in 5 *A. J. Comp. Law*, No. 4 (1956).

⁷ See Final Act, cited *supra*.

⁸ List in M. H. van Hoogstraten, "Quelques notes sur la Conférence de La Haye de droit international privé (IV)," 3 *Nederlands Tijdschrift voor Internationaal Recht* 307, 314 (1956).

the results of the Conference embodied both in draft conventions, which has been the practice of the Conference, and in draft uniform laws.⁹ In their "Memorandum on Method," which was circulated, they pointed to possible advantages over conventions of uniform laws, which can be improved easily; they referred to the American and Canadian experience with uniform and model laws; and they noted that difficulties, which, for federal systems, can result from internal distribution of legislative jurisdiction, do not arise in the case of uniform laws, which may be adopted by the individual members of the federated state. The suggestion was supported by the delegates of the United Kingdom. It found no favor with other delegates, especially the French and the Dutch, who stressed the importance of internationally binding agreements. It was apparent that the American and Canadian practice was not well known, particularly the system of uniform laws with a reciprocity clause by which effects analogous to binding conventions are achieved. The Conference felt that further study of the suggestion was needed and that it would be up to the governments of the member states to draw conclusions from the discussion.

Was the experiment of having an Observer Delegation attend the session worth undertaking? The members of the Delegation have been unanimous in thinking that it was,¹⁰ independently of the merits of the four draft conventions and of whether the principles of one or the other may commend themselves for enactment in American law. A number of facts would indeed seem to be beyond dispute. As a nation with ever-growing international contacts, the United States is greatly interested in progressive unification of rules of private international law. The difficulties arising from differing conflicts rules are a daily concern of the American lawyer on the interstate level, and work on internal unification has been going on for a long time. Whether a conflict arises on the interstate level or in relation to a neighbor country or a nation more remote is a mere accident, and the need for greater uniformity on the international level is no less pressing. Work on unification, as done at The Hague, therefore, deserves support. Results can affect American interests. American views on desirable rules, therefore, should be made known and duly presented.

Progress on unification is slow, even internally. Many questions are not ripe for codification, at least in the opinion of lawyers from the common law world.¹¹ But others are, and the very important question, for

⁹ See *Actes de la Huitième Session de la Conférence de La Haye de Droit International Privé* (1957), sessions of Oct. 18 and 19, 1956, of Commission IV, Documents (1957).

¹⁰ See Kurt H. Nadelmann and Willis L. M. Reese, "The Eighth Session of the Hague Conference on Private International Law," 12 *The Record of the Association of the Bar of the City of New York* 51 (1957), and forthcoming reports by Messrs. Philip W. Amram and Joe C. Barrett in the *American Bar Association Journal* and the *Handbook of the National Conference of Commissioners on Uniform State Laws*, respectively.

¹¹ Even in the civil law countries, a general codification of the rules of conflict of laws is opposed by many. See, *e.g.*, the discussion on codification in the French Committee on Private International Law, Paris, May 20-21, 1955: *Comité Français de Droit International Privé, La Codification du Droit International Privé* 298 (1956).

example, of the right to select in an international sales contract an exclusive forum for litigation is probably among them.¹² Even if practical results cannot be achieved immediately, international exchange of views is desirable. What comes out in discussions of the world's leading specialists is worthy of consideration everywhere. Inevitably, work like that undertaken at The Hague influences the evolution of the law in the courts.

But the appearance of an American Observer Delegation at the Hague Conference has had other advantages. Notice has been given, not only that this country is interested in the work undertaken by the Conference, but also that the United States is capable of taking part in work on the progressive unification of conflicts law. Views are widely held abroad—not without our own fault—that the American Constitutional system prevents this country from co-operating in such work. They are being dispelled, and it will become clear at the same time that co-operation will be according to methods duly tested here and in accord with the American Federal system. If these methods are slow—not slow when the number of components of the Union is considered—they do not compare unfavorably with the limited results achieved in Europe with multilateral conventions. Only results, not method, are important, and the quality of drafts, rather than international commitments, secure uniformity in the long run.

If this is what can be deduced from the appearance in 1956 of an American Observer Delegation at a conference on unification of rules of private international law, a step forward will have been made on the long and difficult road toward achievement of greater uniformity in conflicts law. Avenues for co-operation which seemed to be closed, have been opened finally, and progress has been made over past attitudes of American Administrations,¹³ exemplified only the other day by the failure of the United States Government to send observers to the International Conference on Maintenance Obligations, called by the United Nations, which had as basis for its work a draft convention modeled after the substance of our own Uniform Reciprocal Enforcement of Support Act,¹⁴ and where it was left to the Canadian Observer to explain the "federal problem" and show the possibilities of Canadian co-operation on Provincial level.¹⁵

¹² The Uniform Commercial Code, sec. 1-105 (6), deals with the related question of selection of the law to govern the transaction. Recent cases in Federal courts on selection of a forum: *Wm. H. Muller & Co. v. Swedish American Line, Ltd.*, 224 F. 2d 806 (2d Cir., 1955), 31 N. Y. U. Law Rev. 949 (1956); *Siegelman v. Cunard White Star*, 221 F. 2d 189 (2d Cir., 1955). Cf. Restatement Second, Conflict of Laws § 117a (Tent. Draft No. 4, 1957) ("fair and reasonable" test).

¹³ The history is in Kurt H. Nadelmann, "Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law," 102 U. of Pa. Law Rev. 323 (1954). Cf. Clifford J. Hynning, "International Law: Unification of Private Property Laws," 42 A. B. A. Journal 1135 (1956).

¹⁴ See Contini, "The United Nations Convention on the Recovery Abroad of Maintenance," 31 St. John's Law Rev. 1 (1956).

¹⁵ See Record of the U. N. Conference on Maintenance Obligations, Docs. E/Conf. 2/SR. 1 to 14 (1956).

While it is hoped that the appearance of an American Observer Delegation at The Hague marks the turning point in American co-operation in efforts to unify private law, a series of internal problems of organization have been brought into the open which must be solved. The delegating of observers to the session of the Hague Conference necessarily had marks of improvisation. Precedents were lacking, and any attempt to solve all the problems involved in advance might have resulted in abandonment of the project altogether. But the experiment being over, stock has to be taken of the experience gained. The problems which have come up and are clearly cognizable need to be faced. They turn on the question of how to best organize representation of American interests on the international level when these interests are in an area where the States have primary or exclusive jurisdiction.

Situations involving this problem do not arise merely when a session of the Hague Conference is called, that is, every four or five years. In the first place, the Hague Conference has committees at work in the period between sessions. Second, this country has a representative on the Inter-American Juridical Committee of Rio de Janeiro, permanent bureau of the Inter-American Council of Jurists, which works on unification of law much like the Hague Conference.¹⁶ And the problem arises sporadically when special conferences are called, as in the case of the recent International Conference on Maintenance Obligations. Preliminary drafts must be considered; delegates must be selected at an early stage and duly instructed; the results of the conference must be reported and evaluated for domestic purposes. How is this best to be done?

Calling this an easy question would be illusory. But a number of relevant facts can be put together in searching for possible solutions. The National Conference of Commissioners on Uniform State Laws has the machinery for work on unification of State laws, for internal or international purposes. A number of the laws adopted by the Conference are applicable to interstate as well as international conflicts. If the Conference has so far failed to turn its attention to problems involving foreign nations^{16a}—even contact is lacking with the Canadian counterpart—it must be noted that the Conference was represented on the Observer Delegation for the Hague Conference by a past president. The National Conference, on the other hand, is no expert body. On American conflict of laws such expert body is available at the American Law Institute, currently engaged in revision of the Restatement volume on Conflict of Laws. Experts on foreign and comparative conflict of laws are grouped in such organizations as the American Branch of the International Law Association, which made the original proposal to send an Observer Delegation to the Hague

¹⁶ One of the assignments is study of the possibility of revision of the Bustamante Code on Private International Law in the light of the Montevideo treaties and the Restatement of Conflict of Laws. See Kurt H. Nadelmann, *loc. cit.* note 13 *supra*, at 344; [1952-54] *Inter-American Juridical Yearbook* 169, 271, 297 (1955).

^{16a} But see Presidential Address, [1956] *Handbook of the National Conference of Commissioners on Uniform State Laws* 42, 50.

Conference,¹⁷ the International and Comparative Law Section of the American Bar Association, and the American Society of International Law. Conceivably from such groups a standing commission could be set up at the seat of the Federal Government and under its technical administration to deal with questions of unification of law arising on the international level.¹⁸ Contact with foreign nations being through the Federal Government, the need for participation of the Government of the United States is obvious.¹⁹ And such participation will be more than formal whenever national legislation is a possibility, as in matters concerning commerce with foreign nations.²⁰

Other methods of organization than that suggested above can no doubt be thought of.²¹ What is important is that steps be taken to bring the organizational problem to solution. The question is of sufficient national interest, we think, to warrant calling of a conference of interested groups by the Executive Branch of the Federal Government. The weight which will be given to views expressed at international conferences by American delegates depends upon the solution of our internal problem of organization.

KURT H. NADELMANN

PUBLICATIONS OF THE UNITED NATIONS: INTERNATIONAL TAX AGREEMENTS

In its resolution on "Publications of the United Nations" adopted at the 1956 meeting (PROCEEDINGS, p. 221) the Society

commends . . . (b) That . . . *International Tax Agreements*, as published by the sponsors, be printed by the originating offices in registered form and in the format of the *Treaty Series*, in order that they may be included as volumes in it as sub-series.

A similar proposal was before the General Assembly of the United Nations at its tenth and eleventh sessions. Between sessions it was the

¹⁷ See Report for 1953-54 of the Committee on Private International Law, Elliott E. Cheatham, Chairman, [1954] Proceedings and Committee Reports of the American Branch of the International Law Association 30-35, 78 (1954).

¹⁸ On co-operation with the International Institute for the Unification of Private Law in Rome, see Kurt H. Nadelmann, "Unification of Private Law," 29 Tulane Law Rev. 328 (1955).

¹⁹ In Canada, the Dominion Government is a member of the Conference of Commissioners on Uniformity of Legislation in Canada. This has proved advantageous especially in work on uniform laws designed to be used on the international as well as the inter-Provincial level. An example is the preparation of the new Reciprocal Enforcement of Judgments Act, [1956] Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada 82. See Kurt H. Nadelmann, "Non-Recognition of American Money Judgments Abroad and What to Do About It," 42 Iowa Law Rev. 236, 248 (1957).

²⁰ U. S. Constitution, Art. I, Sec. 8, cl. 3.

²¹ Notice the plan, in a related area, to set up a Commission and Advisory Committee to improve *judicial* co-operation between the United States and foreign countries. Harry LeRoy Jones, "A Commission and Advisory Committee on International Rules of Judicial Procedure," 49 A.J.I.L. 379 (1955). See H. R. 4642, S. 1890, 85th Cong., 1st Sess. (1957). 1 Int. & Comp. Law Bulletin 6 (1957).

object of a detailed study by the Secretary General¹ and the Advisory Committee on Administrative and Budgetary Questions;² on their recommendations the Assembly decided not to adopt this proposal.³

The considerations which led to this decision are readily stated. The two series fulfill very different functions: The *Treaty Series* constitutes a public record of binding international treaties which have been submitted for registration pursuant to Article 102 of the Charter and the Regulations issued thereto. The series *International Tax Agreements*,⁴ on the other hand, serves as a working tool for government officials and other tax specialists in the negotiation, application and study of agreements for the avoidance of double taxation and the prevention of fiscal evasion. To this end the Secretary General collects and publishes all tax agreements immediately upon signature without waiting for their ratification or registration.⁵ As a result, the four text volumes of *International Tax Agreements* published so far contain more than 400 tax agreements, while over the same period only some 50 of these were reproduced in the more than 160 volumes of the *Treaty Series*. At the express request of the Economic and Social Council,⁶ the *International Tax Agreements* series is also published in a Spanish version, which has no counterpart in the *Treaty Series*.

A further reflection of the difference in the functions of the two series lies in their respective coverage of information on the agreements. The *Treaty Series* gives only information on their legal status, while comprehensive data on the status, scope and implementation of all known tax agreements, including those under negotiation, are published periodically in separate volumes of the series *International Tax Agreements*, entitled *World Guide to International Tax Agreements*.⁷ These data, which are authenticated by the governments concerned, cover over 700 agreements concluded by or on behalf of the governments of some sixty countries and fifty overseas territories. In addition to a concise description of the subject matter of each agreement, they indicate the taxes covered by the

¹ "Registration and Publication of Treaties and International Agreements," U. N. Doc. A/3168, pars. 66-75, Aug. 16, 1956.

² "Registration and Publication of Treaties and International Agreements: Seventeenth Report of the Advisory Committee on Administrative and Budgetary Questions to the Eleventh Session of the General Assembly," Doc. A/3387, par. 15, Nov. 23, 1956.

³ General Assembly Resolution 1092 (XI) of Feb. 27, 1957, on "Registration and Publication of Treaties and International Agreements," adopted on the report of the Fifth Committee (Doc. A/3503, par. 11, Jan. 23, 1957).

⁴ Vol. I (Sales No. 1948.XVI.2), Vol. II (Sales No. 1951.XVI.1), Vol. III ("World Guide to International Tax Agreements," Sales No. 1951.XVI.5), Vol. IV (Sales No. 1954.XVI.1), Vol. V ("World Guide to International Tax Agreements," Sales No. 1954.XVI.3), and Vol. VI (Sales No. 1956.XVI.1). Vols. V (Rev.) (Sales No. 1956.XVI.3) and VII are in preparation (to be published in the fall of 1957).

⁵ Pursuant to Economic and Social Council Resolutions 67 (V), 226 B (IX), 486 E II (XVI) and 557 C (XVIII).

⁶ Pursuant to Economic and Social Council Resolution 226 B 1 e (IX).

⁷ Vols. III, V and V (Rev.) (to be published in the fall of 1957).

agreements, the dates of signature and ratification and of the entry into effect of substantive provisions, and references to the territorial scope of the agreements, to national laws and regulations implementing their provisions and to possible modification, suspension, reinstatement, supersedure or termination.

From what precedes, it will be readily seen that a merging of the *International Tax Agreements* series as a sub-series into the *Treaty Series* and a limitation of the former to agreements in registered form would require a complete change in its scope and functions.

IVAN S. KERNO

ANNUAL MEETING OF THE SOCIETY

The 51st Annual Meeting of the American Society of International Law was held at the Statler Hotel in Washington, D. C., from April 25 to April 27, 1957. The sessions opened at 2:00 p.m. on Thursday, April 25, and continued through Saturday morning, April 27, concluding with the annual dinner on Saturday evening at 7:00 p.m.

The first session on Thursday, April 25, at 2:00 p.m., was devoted to the discussion of navigation and other uses of international rivers and canals. Mr. Louis B. Wehle of the New York Bar presided. Professor Charles E. Martin of the University of Washington discussed the issues involved in the dispute between the United States and Canada over the diversion by Canada of the waters of the Columbia River, and proposed principles and procedures to govern future arrangements between the two countries with regard to use of international rivers. Professor Martin was followed on the program by Mr. John G. Laylin of the District of Columbia Bar, who discussed the problem of the Indus Basin in relation to the principles of law governing uses of international rivers, particularly with reference to the statement of principles drawn up at the 1956 Conference of the International Law Association.

Mr. William L. Griffin, Assistant to the Legal Adviser of the Department of State, delivered a paper on "Problems respecting the Availability of Remedies in Cases Relating to the Uses of International Rivers," with specific reference to the problems involved in the use of the St. Lawrence waterway.

Professor Norman J. Padelford of the Massachusetts Institute of Technology gave an address on "The Panama Canal and the Suez Crisis," comparing the status of the rights in the Panama Canal and those in the Suez.

The final speaker of the Thursday afternoon session was Mr. George A. Finch, Honorary Vice President of the Society, who discussed international law principles applicable to the navigation and use of the Suez Canal, with specific reference to the nationalization of the Canal by Egypt.

In his presidential address on Thursday evening at 8:15 p.m., Mr. Lester H. Woolsey discussed "Peace with Justice." He declared that at the present time the trust and confidence and freedoms that peace requires for its germination and nourishment are wholly lacking, and he questioned whether they can be attained in the present atmosphere. He declared that

peace must be based on moral principles, on the sanctity of promises we live by and on the principles of right and wrong and fair dealing of everyday living.

With regard to the judicial process as a means of dispensing justice, Mr. Woolsey stated that it should be so formulated as to get to the merits of a case regardless of technical and special rules of law or procedure. Stating that the better opinion is that courts should not pass on political questions, which involve the highest policies of government and the profoundest disputes between nations often leading to war, President Woolsey asked where such questions should go for determination or adjustment. He then discussed the United Nations as the forum for the settlement of political disputes between states, stating that one of the road-blocks to justice is the fact that political bodies often undertake to decide legal questions, and that the record of the United Nations in this respect is not enviable.

Mr. Woolsey declared that a just settlement of a political problem would have to take into consideration the interest of all the states which would be substantially affected by the settlement and that such interest should be a peaceful one, not a predatory one or one to settle old grudges. He added that the settlement should not represent a judgment by the parties most interested. Declaring that in the growing community of nations the *status quo* must give way to changes of growth, he stated that peaceful change must be the result of negotiation.

President Woolsey referred to the change in the structure of the United Nations Assembly caused by the recent admission of new states from Asia and Africa. This influx of such new states, he said, "must inevitably soften by a sort of mutilation, the hard core of Western civilization and culture represented in the Assembly." Without the ballast of Western ideals of administration, law and justice—a habit of peaceful ways of settlement according to acceptable moral standards, the General Assembly would have been unable to ride out the crises of the last decade and may not be able to meet those of the future. Mr. Woolsey stated that this prospect caused by the change in the composition of the Assembly "would change the usefulness of the United Nations and the history of the world," and added that "the purpose of the Soviets to gain control of the Assembly is emerging and well advanced."

In conclusion, he stated that "the political field where immense unsettled problems lie deadlocked today and where the future problems may stagnate tomorrow . . . needs additional machinery to promote solutions," and he suggested that one possible remedy might be the revision of the voting procedure in the United Nations Assembly. Another possible remedy would be the establishment of a special political commission or tribunal of fifteen members to consider political matters only.

Dr. Eduardo Augusto García, the Argentine Ambassador to the Organization of American States, delivered an address on "Human Rights and the Practical Means of Assuring Them." He stated that the civilized citizen today "should not discard as outmoded and senseless the principles according to which governments have subjected themselves to law, the powerful

have become responsible, and the rights of the common man have been established, so that he may live with dignity and without fear." Dr. García added that we should not forget the sacrifices of those who fought to make such gains possible. Referring to the Universal Declaration of Human Rights, he asserted that a practical means should be found to see that the Declaration is respected and observed throughout the world, and proposed that a vigorous campaign through various media of communication be launched so that careful study can be given to the problem. Ambassador García's own view, he declared, was that the Universal Declaration of Human Rights can be enforced by domestic legislation, and he suggested that the United Nations General Assembly recommend to the Member States that they adopt such legislation.

On Friday morning, April 26, at 10:00 a.m., the subject of discussion was "Intervention under the United Nations Charter and under the Charter of the Organization of American States." During the first part of the session, over which Professor Robert R. Wilson presided, Professor Quincy Wright delivered a paper on "The Legality of Intervention under the United Nations Charter." Professor Wright discussed the meaning of intervention in international law and its political and legal justifications. He stated that "Intervention does not gain in legality by being collective rather than individual under customary international law." Under the United Nations Charter, he said, collective intervention is permissible if it constitutes collective self-defense under Article 51 or collective security initiated by the Security Council under Chapter VII of the Charter or by the General Assembly under the Uniting for Peace Resolution. The speaker stated that ultimately the justification for intervention is a question of international law which cannot be finally decided by one party to the dispute. He called attention to the sharp distinction between military and non-military intervention as laid down in the United Nations Charter. Military intervention by states is restricted to the necessities of individual or collective self-defense, treaty obligations or United Nations authorizations. Professor Wright concluded by stating his belief that more general recognition of the limits placed upon intervention by international law and the Charter, and the development of procedures assuring that intervention will be undertaken only at United Nations initiative, will contribute to stability at this time. In the face of the suicidal character of atomic war today, the problem of interventions and small wars may be amenable to controls of international law and the United Nations.

In the latter part of the session on Friday morning, at which Dr. Charles G. Fenwick presided, Dr. Ernesto Dihigo, Director of the Inter-American Academy of Comparative and International Law, spoke on "The Legality of Intervention under the Charter of the Organization of American States." He stated that non-intervention has been called the "central axis" of the inter-American system, and that although it is not considered in the same light as in previous periods, it is still a cornerstone of international law and co-operation in the Western Hemisphere. Referring to the application of the Monroe Doctrine under various circumstances by the United States

and the reactions of the Latin American Republics, Dr. Dihigo stated that the principle of non-intervention was developed by these republics as a means of protecting themselves from what they considered violations of their national sovereignty by the United States. The speaker discussed intervention as defined in the Charter of the Organization of American States and as practiced by the Organization itself, and pointed out the conditions under which there might be collective intervention by the Organization in the affairs of individual states of the Hemisphere, referring specifically to the totalitarian threat of international Communism. He stated that there had recently developed a general tendency, not confined to Latin America, which regards it necessary to sacrifice a part of sovereignty in order to guarantee the existence of democracy and the protection of human rights. As an example of this trend Dr. Dihigo cited the Rodríguez Larreta Doctrine, proposed in 1945, under which there should be collective intervention whenever necessary for the defense of essential principles. Although this doctrine has not found acceptance in official circles, it has been approved among distinguished internationalists. The speaker stated that in his view democracy is as fundamental a principle in the inter-American system as non-intervention. Human rights are a part of democracy, as shown in the American Declaration of Rights and Duties of Man. Dr. Dihigo stated that the inter-American system will have to find the means of eradicating from the Western Hemisphere those dictatorships that now and then obscure democracy and encroach on essential human rights. He concluded that the stage of international development has not yet been reached in which collective action for the defense of democracy against national dictatorships would be accepted by all without serious opposition, but that the time will come when such a form of intervention will be gladly accepted. The inter-American system will then have a new and very important function to fulfill.

Following Dr. Dihigo's address, Professor Martin Travis, of Columbia University, delivered a paper on "Collective Intervention by the Organization of American States," referring in detail to the provisions of the United Nations Charter, the Rio Treaty of Reciprocal Assistance and the Charter of the OAS. He discussed the Council of the OAS and the practice of collective intervention, and declared that the American States are united on a policy of acting collectively against an armed attack, and favor collective action also against any unilateral intervention affecting their territorial integrity and political independence. Professor Travis cited a number of inter-American disputes handled by the Council of the OAS. He stated that the social force of internationalism, with its doctrine of collective intervention, is just emerging in the Western Hemisphere. It was his view that Latin Americans suspect that the United States will exploit collective intervention in its concern for self-preservation, but hope that the non-intervention doctrine will be self-supporting. He stated that if Latin American suspicions are to be resolved, and a viable Organization of American States developed, agreement must be reached on inter-American objectives. The proper competence of the United States in regional affairs should be recog-

nized, and the Monroe Doctrine internationalized by permitting the Latin American countries to submit major disputes to the United Nations for determination. Professor Travis stated that it is incumbent upon the United States to assume the leadership in sponsoring the enforcement of international law under the Bogotá Charter, and any delay by the OAS Council in fulfilling its responsibilities under that Charter imperils the continued existence of the inter-American system.

At the Friday afternoon session, beginning at 2:00 p.m., a number of speakers discussed the improvement of the organization for collective security. Among those on the program were Mr. Edgar Turlington of the District of Columbia Bar, Mr. Lawrence D. Egbert of American University, Professor Ruth C. Lawson of Mount Holyoke College and the Honorable George T. Washington, Judge of the Circuit Court of Appeals for the District of Columbia Circuit. Mr. Charles S. Rhyne, president-elect of the American Bar Association, also addressed the meeting on "The Need for Law Leadership in Securing Peace under Law." Following the Friday afternoon session there was an informal reception and cocktail party at the Statler Hotel for the officers and members of the Society and their guests.

On Friday evening at 8:15 p.m. a panel discussion took place on international law and agreements relating to atomic weapons and the peaceful uses of atomic energy. Dean E. Blythe Stason of the University of Michigan Law School, was chairman of the panel, which consisted of William T. Mallison and Raymond R. Edwards of the Division of International Affairs of the Atomic Energy Commission, Eric Stein of the University of Michigan Law School, and Leonard Meeker, Assistant Legal Adviser, Department of State. Mr. Mallison gave a legal analysis of the bilateral agreements for cooperation in the civil uses of atomic energy; Dr. Edwards discussed the development of atomic energy programs in the free world; and Professor Stein described the new International Atomic Energy Agency provided by the Statute drafted in October, 1956.

The annual dinner on Saturday evening, April 27, held in the South American Room of the Statler Hotel at 7:00 p.m., concluded the sessions. Professor Robert R. Wilson of Duke University, the newly elected President of the Society, presided. Dr. José A. Mora, Secretary General of the Organization of American States, delivered an address on "The Contributions of the American States to World Peace." He was followed by the Honorable Robert R. Bowie, Assistant Secretary of State for Policy Planning, who discussed "Tasks Ahead for the Free World." The final speaker was Senator Theodore F. Green, Chairman of the Senate Committee on Foreign Relations, who spoke on the "Maintenance of Law in the World Community."

At the meeting on Saturday morning, April 27, at 10:00 a.m., papers delivered at the previous sessions were discussed, particularly questions raised in connection with the subjects of intervention under the Charters of the United Nations and the Organization of American States, and the nationalization by the Egyptian Government of the Suez Canal. Follow-

ing the discussion, Professor Louis B. Sohn of Harvard University presented the report of the Society's Committee on Study of Legal Problems of the United Nations, dealing in detail with the establishment of the United Nations Emergency Force in connection with the Suez Canal crisis and reviewing the history of efforts since the war of 1914-1918 to establish an international police force.

Mr. Denys P. Myers presented the report of the Committee on Publications of the Department of State and the United Nations, and in connection therewith presented the following resolution which was adopted:

PUBLICATIONS OF THE DEPARTMENT OF STATE AND THE UNITED NATIONS

Whereas, The American Society of International Law has since 1929 reviewed the status of the publication program of the Department of State with a view to supporting and developing the system of issuing documentary material essential to the understanding of the foreign relations of the United States; and

Whereas, The Department of State has been responsive to these annual representations and the Congress in recent years has progressively recognized the importance of such programs as submitted in the budgetary estimates; and

Whereas, The members of the Society have a similar need for adequate publication by the system of the United Nations of materials pertinent to their professional requirements; therefore,

Be it resolved by The American Society of International Law:

1. That the Congress of the United States is requested to provide in the Department of State Appropriation Act, 1958, for

(a) personnel for initiating compilation of a continuation of the Wharton, Moore and Hackworth digests of the actions of the United States Government in the field of international law;

(b) continued compilation and resumption of issuance of *United States Treaty Developments*;

(c) initiation of the projected edition of treaties and agreements, 1776-1949;

(d) continuation on the established scale of the publication of *Foreign Relations*, including the heads-of-state conferences, 1941-44.

2. That the Department of State is commended for the present scope of its program to compile and publish the essential records of international relations, specifically for projecting a new digest of international law, resumption of *United States Treaty Developments*, undertaking a more authentic English edition of international instruments from 1776 to 1949, establishing the annual *Treaties in Force*, and starting the summary compilations on *American Foreign Policy*.

3. That the Society appreciates the decision of the General Assembly of the United Nations to maintain its *Treaty Series* on the sound standard provided in the Regulations of 1946, commends to the Department of State and Foreign Offices of other states of which members of the Society are nationals the proposal that they provide both French and English versions of instruments presented for registration, and congratulates the Secretariat upon diligence in providing general indexes of the *Treaty Series* and upon its continued effort to surmount the problems of editing and prompt publication.

4. That the United Nations is performing essential services in continuing the *Repertory of Practice of United Nations Organs* and in inaugurating the *Yearbook of the International Law Commission*.

The Society also adopted the following resolution upon the recommendation of the Executive Council:

REVIVAL OF THE AMERICAN INSTITUTE OF INTERNATIONAL LAW

Resolved,

That the Society endorses the plan of reviving the American Institute of International Law, recognizing the important work it has performed in the past and suggesting that an important function it might undertake would be to coordinate the work of the national societies of international law in accordance with the original objective of the Institute when created more than forty years ago.

This action was taken with the explicit understanding that it did not commit the Society financially in any way.

Upon the recommendation of the Committee on Selection of Honorary Members the Society unanimously elected as an honorary member of the Society Dr. Hans Wehberg, Editor of *Die Friedens-Warte*, co-editor of the *Archiv des Völkerrechts*, Professor at the *Institut des Hautes Etudes Internationales*, Geneva, and Secretary General of the *Institut de Droit International*.

Upon the report of the Nominating Committee the following officers were elected for the coming year:

President: Robert R. Wilson; Honorary President: The Honorable John Foster Dulles, Secretary of State.

Vice Presidents: Herbert W. Briggs, Hardy C. Dillard, Myres S. McDougal.

Honorary Vice Presidents: Dean G. Acheson, Justice Harold H. Burton, Philip Marshall Brown, William S. Culbertson, William C. Dennis, Edwin D. Dickinson, Charles G. Fenwick, George A. Finch, Judge Green H. Hackworth, Honorable Stanley K. Hornbeck, Judge Manley O. Hudson, Philip C. Jessup, Hans Kelsen, Ambassador Amos J. Peaslee, Lester H. Woolsey, Quincy Wright.

The following were elected to serve on the Executive Council of the Society until 1960: Homer G. Angelo of San Francisco; Richard R. Baxter, Harvard Law School; Edward H. Buehrig, University of Indiana; Alwyn V. Freeman, Washington, D. C.; Philip C. Jessup, Columbia University; Leonard C. Meeker, Assistant Legal Adviser, Department of State; Honorable Davidson Sommers, International Bank for Reconstruction and Development; and Mr. Louis B. Wehle, New York City.

The members of the Nominating Committee elected for the coming year are: Hardy C. Dillard, Chairman; Gertrude C. K. Leighton, Carl Marcy, Charles E. Martin, Louis B. Sohn.

The Executive Council of the Society at its meeting on Saturday, April 27, 1957, re-elected Mr. Edward L. Merrigan Treasurer, and Mr. Edward Dumbauld Secretary, of the Society for the coming year. It also re-elected the members of the Board of Editors of the AMERICAN JOURNAL OF INTERNATIONAL LAW. Mr. Denys P. Myers was reappointed Assistant Treasurer of the Society and the undersigned Executive Secretary and Secretary of the Board of Editors of the JOURNAL.

ELEANOR H. FINCH

JUDICIAL DECISIONS *

BY BRUNSON MACCHESNEY

Of the Board of Editors

Sovereign immunity—unauthorized transfer of debt—new evidence
NIZAM OF HYDERABAD AND ANOTHER v. JUNG AND OTHERS. [1957]
1 All E. R. 257.

Court of Appeal, Dec. 20, 1956. Lord Evershed, M.R., Birkett and Romer, L.JJ.¹

In September, 1948, a sum of approximately £1,000,000 was standing to the credit of the Government of the Nizam of Hyderabad with a bank in London. During this month the Finance Minister of the Nizam's Government (called hereafter M), and the Agent-General for Hyderabad in London, Mr. Mir Jung (called hereafter Mir), who were entitled to draw on the account, gave instructions to the bank to transfer the account to Mr. Habib Ibrahim Rahimtoola (hereafter called R), then holding the office of High Commissioner in London for the State of Pakistan. Within a few days of the transfer, the Nizam sent cables to both M and the bank requesting a retransfer. It appears that at this time (though not part of the evidence in the case) the armed forces of India were in the process of invading the State of Hyderabad. In 1952 R ceased to be High Commissioner in London. The fund, however, remained in his name. In May, 1954, solicitors for the Nizam wrote R and the bank, on the Nizam's instructions, that M had possessed no authority to order the transfer. This letter with a supporting affidavit from the Nizam was not available at the time of trial in the Chancery Court. The Chancery Court per Upjohn, J., had held that there was no proof that M and Mir had acted in breach of duty. In July, 1954, the Nizam and the State of Hyderabad issued a writ in an action against M, the bank, and R. On application of R the Chancery Court set aside the writ and stayed proceedings against the bank on the ground that the action impleaded the sovereign State of Pakistan.

On appeal by the plaintiffs it was held that R was not entitled to invoke the doctrine of sovereign immunity because: (1) the transfer of the debt to R was not equivalent to a vesting of the debt in the State of Pakistan; (2) there was no evidence to support any claim by the state to a beneficial title to the debt and hence there was no control over the debt sufficient to render a continuation of the action on assertion of jurisdiction over the state. The case of *United States of America & Republic of France v. Dollfus Mieg et Compagnie S.A. & Bank of England*, [1952] 1 All E.R.

* Acknowledgment is made of the assistance from Hardy C. Dillard of the Board of Editors on the English cases.

¹ For a report of this case in the Chancery Court, see 51 A.J.I.L. 118 (1957).

572, was distinguished in that the *Dollfus Mieg* case involved gold bars which the sovereign as bailor had a right to recover, whereas the present case involved a chose in action carrying no right to possession in the absence of a showing of legal title. The court also discussed the possible application of doctrines of resulting trust but found it unnecessary to rest its decision on a trust theory.

Leave to appeal to the House of Lords was granted.

Lord Evershed, speaking for himself and Lord Birkett, quoted with approval an excerpt from the opinion of Lord Radcliffe in the *Dollfus Mieg* case, stating at p. 265:

From this passage it sufficiently appears, in our judgment, that the prohibition which is of the essence of the rule, is a prohibition against the assertion by the English court of jurisdiction to entertain proceedings against a sovereign who (or a sovereign state which) is unwilling to submit to such jurisdiction. Whenever, therefore, the rule is invoked in a proceeding to which the sovereign is not made or sought to be made a party but in which the subject-matter is some property in regard to which the sovereign has or claims some kind of right or interest, the applicability of the rule depends on the extent to which the prosecution of the claim so affects the right or interest of the sovereign "as to amount in one way or another to a suit against the sovereign." The proposition is imprecise, no doubt; but as LORD RADCLIFFE observed, the law cannot be set at rest "by any neat combination of words."

In the *Dollfus Mieg* case the rule was held to be applicable because, notwithstanding the admitted absence of title in the sovereigns and its admitted presence in *Dollfus Mieg et Compagnie*, the sovereigns as bailors of the bars with the bank had vis-a-vis the bank an immediate right to recover their possession with which, inevitably, the continuance of the action would interfere; so that if the sovereigns desired to recover the possession which they formerly had they would be compelled to come to the English court for the purpose (see per VISCOUNT JOWITT [1952] 1 All E.R. at pp. 580, 581, 582, per LORD PORTER, *ibid.*, at pp. 585, 586; per LORD RADCLIFFE, *ibid.*, at p. 589).

The present proceeding relates not to chattels but to a chose-in-action. It is, therefore, on matters of essential fact distinct from the *Dollfus Mieg* case. For where the subject-matter of the proceedings is a chose in action there can be no question, strictly, of possession. Prima facie any rights or interests in respect of it must be matters of title. So much has been laid down for us by this court in *Haile Selassie v. Cable & Wireless Ltd.* ([1938] 3 All E.R. 384). The judgment of the court in that case must clearly be preferred, in our view, to the suggestion that there might be "possession" (in the true significance of that term) of a chose-in-action in the judgment at first instance in the American case of *Bradford v. Chase National Bank of City of New York* ((1938), 24 Federal Supplement 28). If the question depends on some claim of title on the part of the sovereign, then it cannot, in our judgment, suffice that the sovereign has at some time asserted a title to the fund if, when the rule is invoked, there appears no evidence at all in support of such claim—more particularly if it is conceded on behalf of the sovereign's representative that the claim

to immunity is not founded on any title or proprietary interest (see e.g., *Juan Ysmael & Co., Incorporated v. Government of the Republic of Indonesia*, [1954] 3 All E.R. 236).

The court also stated at pp. 268 and 269:

But whether or not Mr. Rahimtoola took, and was intended to take, the transfer as agent for the State (or government) of Pakistan, the transfer to him in, or by virtue of, his office as High Commissioner cannot be treated, in our judgment, as a transfer to one of the principal officers of the state which would so identify its holder with the state itself as to have made the vesting equivalent for all relevant purposes to a vesting in the state.

As a result of the letter of May, 1954, Mr. Rahimtoola (and his alleged principal) received clear notice, since confirmed by the Nizam's sworn testimony, that the fund belonged in equity wholly to the Nizam and that his agents had no power to give that interest away; so that the person in whose name the legal interest stood held it on a resulting trust for the beneficial owner who has intervened, by assertion of his equitable right, before the agent has accounted to his principal. In any case, as it seems to us, the alleged principals not having established in themselves, in UPJOHN, J.'s words, "a scintilla of title," Mr. Rahimtoola now stands in truth as a third party wholly distinct from the government or State of Pakistan.

The point on which, in our view, the Nizam is entitled to succeed before us was not put to, or considered by, the learned judge, who did not have before him the Nizam's affidavit.

Extradition—effect of war on treaties—construction by the Executive—suspension and revival

ARGENTO v. HORN. 241 F. 2d 258.

U. S. Ct. A., 6th Circuit, Feb. 12, 1957. Stewart, Ct. J.

By *habeas corpus* and declaratory judgment, appellant had challenged the legality of his commitment under extradition proceedings on the primary ground that there was no valid extradition treaty in force between the United States and Italy. In affirming the District Court's decision upholding the commitment, the court said in part:¹

Without question the appellant is on sound ground in asserting that he cannot be extradited to Italy in the absence of a valid treaty so providing. That the Executive is without inherent power to seize a fugitive criminal and surrender him to a foreign nation has long been settled. *Valentine v. United States, ex rel. Neidecker*, 1936, 299 U. S. 5, 57 S.Ct. 100, 81 L.Ed. 5; see *Factor v. Laubenheimer*, 1933, 290 U. S. 276, 54 S.Ct. 191, 78 L.Ed. 315.

While Congress might conceivably have authorized extradition in the absence of a treaty, it has not done so. The law is clear. Title 18 U.S.C.A. § 3181, states, "The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government." This condition is repeated in 18 U.S.C.A. § 3184, making the provisions of that

¹ Footnotes omitted.

section operable only "whenever there is a treaty or convention for extradition between the United States and any foreign government."

As to the existence of a valid extradition treaty between the United States and Italy, the parties are in agreement upon the underlying facts. They differ completely in the conclusions to be drawn from them.

A treaty of extradition was concluded between the two nations in 1868, 15 Stat. 629. Valid amendments were made to the treaty in 1869 and 1885, 16 Stat. 767 and 24 Stat. 1001. Murder was one of the crimes made extraditable by the treaty.

On December 11, 1941, 55 Stat. 797, the Congress of the United States declared that a state of war existed between the United States and Italy. At the conclusion of the war a treaty of peace was concluded, effective September 15, 1947. 61 Stat. 1245. This peace treaty, which was duly ratified by the United States Senate [*sic*], provided in Article 44 as follows:

"1. Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy it desires to keep in force or revive. Any provisions not in conformity with the present Treaty shall, however, be deleted from the above-mentioned treaties.

"2. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.

"3. All such treaties not so notified shall be regarded as abrogated." 61 Stat. 1386.

On February 6, 1948, the Secretary of State of the United States notified the Republic of Italy that the United States desired to keep in force or revive, among others, the Extradition Treaty of 1868, as amended.

It is the appellant's position that under established principles of international law the outbreak of war between Italy and the United States in 1941 operated to abrogate completely the extradition treaty previously existing between the two nations. That being so, the appellant argues that in order to revive the extradition treaty it was necessary to make a new treaty, and that a new treaty under the Constitution of the United States could have been made only by the President, with the explicit concurrence of the Senate by a two-thirds vote. U. S. Const. Article II, Section 2. The appellees concede in their brief, as they obviously must, "that it would * * * require the concurring action of the President and the Senate to re-enact a treaty once dead as distinguished from one which is dormant or held in abeyance. * * *"

Whether the war between Italy and the United States completely annulled the previous extradition treaty is thus the central question before us. If the war did have that effect, the appellant is correct in his position that there is now no treaty of extradition between the two nations, since it is conceded that the "notification" of February 6, 1948, was not submitted to the United States Senate for its advice and consent.

Early publicists adopted the view that war *ipso facto* abrogates all treaties between the belligerent nations. In more recent times, however, this theory has been rejected by the text-writers in international law, and it seems never to have been espoused by courts in the United States.

The question was first considered by the Supreme Court in *Society for Propagation of the Gospel in Foreign Parts v. New Haven*, 1823, 8 Wheat. 464, 5 L.Ed. 662. Although dicta, the views the Court there expressed have never since been questioned: . . . [Quotation omitted.]

This statement was cited as basic law in the United States as recently as 1947 in *Clark v. Allen*, 1947, 331 U. S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633, where it was said, "We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions." 331 U. S. at page 508, 67 S.Ct., at page 1435.

While it is therefore settled, at least in this country, that all treaties are not automatically abrogated by the outbreak of war between the parties, it is not easy to postulate an applicable standard to determine whether a particular treaty has survived a war. The difficulty was stated more definitively than was the solution in *Karnuth v. United States*, 1929, 279 U. S. 231, at page 236, 49 S.Ct. 274, at page 276, 73 L.Ed. 677: . . . [Quotation omitted.]

Counsel have cited us to no decision and we have found none, specifically relating to the effect of war upon a treaty of extradition. Such a treaty does not conveniently fit into either of the alternative classifications set out in the *Karnuth* opinion quoted above. If the question were to be decided in a vacuum, the conclusion could only be that it is extremely doubtful that war *ipso facto* abrogates a treaty of extradition. Fortunately, however, the question need not be so decided, but can and must be decided against the background of the actual conduct of the two nations involved, acting through the political branches of their governments.

In *Terlinden v. Ames*, 1902, 184 U. S. 270, 22 S.Ct. 484, 489, 46 L.Ed. 534, where the question for decision was whether an extradition treaty between the United States and the Kingdom of Prussia had survived the absorption of Prussia into the German Empire, it was contended that this treaty "had been terminated by operation of law" as the result of the formation of the German Empire. In deciding that the treaty had survived, the Court relied heavily upon the intention of the parties as revealed by the conduct of their executive departments. "* * * [W]e think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance." 184 U. S. at page 285, 22 S.Ct. at page 490. "* * * [I]t cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both governments had proceeded, had terminated by reason of the adoption of the Constitution of the German Empire, notwithstanding the judgment of both governments to the contrary." 184 U. S. at pages 289-290, 22 S.Ct. at page 492.

The consummation of the treaty of peace with Italy in 1947 containing Article 44 providing for "notification" by the United States of each pre-war bilateral treaty it desired to keep in force or revive, the ratification of that treaty by the United States Senate [*sic*], the subsequent notification by our State Department with regard to the extradition treaty, and the conduct of the political departments of the two nations in the ensuing nine years, evidencing their unqualified understanding that the extradition treaty is in full force and effect, all make it obvious that the political departments of the two governments considered the extradition treaty not abrogated but merely suspended during hostilities. There is, to be sure, a certain circuitry of reasoning in deciding that the parties did not need to make a new treaty of extradition for the reason that they did not in fact make one. Yet

it is exactly that pragmatic and cautious approach that, if the question is doubtful, the authorities enjoin. *Terlinden v. Ames*, 184 U. S. 270. 22 S.Ct. 484, supra. "A construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight." *Charlton v. Kelly*, 1913, 229 U. S. 447, at page 468, 33 S.Ct. 945, at page 952, 57 L.Ed. 1274. See Judge Mack's scholarly opinion in *The Sophie Rickmers*, D.C.S. D.N.Y. 1930, 45 F.2d 413, and Judge Cardozo's eloquent discussion in *Techt v. Hughes*, 1920, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166.

It is our conclusion that the treaty of extradition between the United States and Italy was not terminated but merely suspended during the war, and that it is now in effect. . . .¹

Jurisdiction—individual duty under international law not to pay taxes appropriated for alleged aggressive foreign and military policies—international law alleged to supersede national law—political questions—standing to sue

FARMER v. ROUNTREE; *STYLES v. U. S.*; *U. S. v. FARMER*.²

U. S. Dist. Ct., M. D. Tenn., Nashville Div., Oct. 17, 1956. Miller, D. J.

In actions for declaratory and injunctive relief, plaintiffs challenged the legality of income taxes collected for the pursuance of alleged aggressive military and foreign policies violative of international law. Individual taxpayers seek to conduct an inquiry into the alleged illegal policies. The Government moved for judgment on the pleadings on the ground that they showed no jurisdiction as a matter of law. In sustaining the Government's motion, the court said in part:

The stated purpose of the proposed proof is to show that the military and foreign policies of the United States since World War II, including the prosecution of the Korean War, were designed and carried out not for the purpose of defense or the protection of the proper interests of the United States, but for the purpose of aggrandizement and to impose military domination by the United States throughout the world. It is argued that such alleged activities on the part of the Federal Government are in violation of international law and are therefore illegal and void. Once these alleged facts are established, so the taxpayers argue, they have the right as individuals under principles of international law to refuse payment of two-thirds of their income taxes for the reason that the federal revenue in that proportion has been illegally appropriated by Congress to the preparation for and waging of aggressive war, and the remaining one-third to the legal and constitutional functions of government. They contend, in short, that international law overrides the internal laws of the United States and extends to them as individual citizens not only the right but the duty to refuse to participate in the so-called aggressive military activities of the country, and hence the right to refuse payment of taxes appropriated for those purposes. Otherwise, it is argued that they would be guilty as war criminals under international law and punishable as such.

¹ See editorial comment above, p. 610.

² Unreported memorandum opinion made available through the courtesy of Oliver J. Lissitzyn of the Board of Editors. Now reported as *Farmer v. Rountree*, 149 F. Supp. 327.

But giving the taxpayers the benefit of all factual allegations of their pleadings, whether admitted or denied by the Government, it is apparent that their claims cannot be legally supported and that no amount of proof could give them validity. Under such circumstances, to permit the proposed inquiry to be made would be an abuse of the processes of the Court, as well as a waste of judicial time seriously needed in the trial and consideration of other cases.

Courts are constituted to adjudicate cases and controversies properly coming within the judicial sphere of action. They have no right or authority to resolve political or governmental questions, or to review issues of governmental policy entrusted to the executive and legislative department. . . .

Under the Constitution of the United States, Congress is vested with the exclusive right to levy taxes and to appropriate public revenue for the common defense and general welfare of the country, *Constit. Art. 1, Sec. 8, Cl. 1*, and to provide for and maintain an army and a navy, *Constit. Art. 1, Sec. 8, Cls. 12 and 13*. It has, as it must necessarily have, the authority, exclusive of any court, to determine the requirements of national defense and the amount of tax revenue to be used for defensive or military purposes.

The foreign policy of the United States is the exclusive province of the executive and the legislative branches of government, and in this area of responsibility, as well as in all questions of national defense, it is imperative that courts strictly observe the limitations upon their power and refrain from rendering any judgment which would embarrass the policy decisions of government or involve them in confusion and uncertainty.

With these principles in mind, it is apparent that the Court is without jurisdiction of the claims here asserted. To grant taxpayers the relief they seek, the Court would be required to substitute its judgment for that of the other two branches of the Government by declaring that the foreign and military policies of the nation were in reality for illegal and aggressive war and not for the legitimate purpose of national security or for the preservation of the essential interests of the United States. The judiciary not only does not have the proper criteria or the technical competence to make such determinations, but it is without the means of obtaining the varied and complex facts which would be required to draw a conclusion. Even if it could develop criteria and obtain the facts, it is altogether clear that the courts must refrain from intruding or intermeddling in realms so manifestly political and non-judicial. If the judiciary should assume the power contended for, thus in effect reversing and condemning the considered judgment of the President and the Congress, the foreign and military policies of the Federal Government could have no real finality until approved by the courts at the conclusion of interminable private litigation. The chaotic and disruptive effects of such judicial censorship are so obvious that comment upon them is unnecessary.

No taxpayer or citizen has the right to have the judiciary conduct an inquiry into the military and foreign policies of the United States, or to review or reexamine the appropriations made by Congress for military and defense purposes. The courts have no more authority to sit in judgment upon such discretionary acts and decisions of the executive and legislative departments, after the event, than they would have to restrain them or advise them what to do in the first instance.

There are many examples where the courts have refused to inter-

vene because due regard for the effective working of our government revealed the issue to be one of a purely political nature and, therefore, not proper for judicial determination.

Violation of the guarantee of a republican form of government to the states cannot be challenged in the courts. *Pacific States Tel. & Tel. v. Oregon*, 223 U. S. 118. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion. *State of Mississippi v. Johnson*, 4 Wall. 475. Questions affecting the boundaries of nations are political questions and the courts must respect the pronounced will of the legislature. *Foster v. Neilson*, 2 Pet. 253, 309. The same is true with respect to the recognition or non-recognition of foreign governments, *Oetjen v. Central Leather Co.*, 246 U. S. 297; the duration of a state of war, *The Protector*, 12 Wall. 700; and the abrogation of treaties, *The Chinese Exclusion Case*, 130 U. S. 581. Similar cases of judicial restraint with respect to purely political questions could be multiplied indefinitely. But none can be found more strikingly illustrating the necessity for non-interference by the courts than the present actions.

Another reason that the Court lacks jurisdiction to adjudicate the claims in question is that the Supreme Court of the United States has established and adhered to the doctrine that an individual taxpayer has no right to challenge a federal appropriation act on the ground that it is invalid and will result in taxation for illegal purposes. *Massachusetts v. Mellon*, 262 U. S. 447, 67 L.Ed. 1078. In such cases the rights of the individual are not affected in such manner as to give rise to a judicial controversy.

Aside from the Court's lack of jurisdiction to adjudicate facts essential to the taxpayers' case, there are still other fatal objections to the claims. In the first place, the Court does not agree that there exists a principle of international law operating to relieve citizens from their tax obligations and liabilities under the local laws of their country, or imposing upon them individual responsibility for the use made of tax revenue. No precedent for such a view has been cited and it finds no support in the language or purpose of any international engagement to which this country is a party. The Nuremberg Judgment was based upon altogether different facts and does not support the theories of immunity here advanced.

Secondly, if the principle could be discovered, it could not be enforced so as to interfere with or impair the exclusive and non-delegable powers of the executive and legislative departments with respect to the foreign and military policies of the nation. The treaty-making power "does not extend so far as to authorize what the constitution forbids." *Geofroy v. Riggs*, 133 U. S. 258, 33 L.Ed. 642, 645; *Asakura v. Seattle*, 265 U. S. 332, 68 L.Ed. 1041, 1044. . . .

Trading with the Enemy Act—1951 Joint Resolution of Congress terminating war with Germany—effect of subsequent treaties and "Bonn Occupation Agreements"—standing to sue

FARBENFABRIKEN BAYER, A.G. v. STERLING DRUG, INC. 148 F.Supp. 733.

U. S. Dist. Ct., D. New Jersey, Feb. 5, 1957. W. F. Smith, D. J.

Plaintiff, a German corporation, brought action against defendant American corporation for alleged breach of contract occurring in 1941,

or shortly thereafter, and prior to January 1, 1947. The claims on which action was brought were subject to seizure and vesting under the Trading with the Enemy Act of 1917.¹ Defendant's answer alleged as an affirmative defense the express limitation in House Joint Resolution No. 289, approved October 19, 1951.² On defendant's various motions for judgment, the court said in part:

There can be no doubt that as to property which "was subject to vesting or seizure" prior to January 1, 1947, the right of the United States was preserved and the enemy status of a German corporation was continued, notwithstanding the termination of the state of war. The disqualification incident to the enemy status of a German corporation was likewise continued. It is well established that a nonresident enemy alien, until the disqualification is lifted by a treaty of peace or otherwise, may not invoke the jurisdiction of the Court. *Johnson v. Eisentrager*, 339 U. S. 763, 776, 70 S.Ct. 936, 94 L. Ed. 1255; *Ex parte Colonna*, 314 U. S. 510, 511, 62 S.Ct. 373, 86 L.Ed. 379; Sec. 7(b) of the Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 7(b). This principle applies to a corporation organized under the laws of an enemy state.

We are of the opinion that a German corporation may not prosecute an action to enforce a right of property which is subject to seizure by the Alien Property Custodian under the provisions of the Trading with the Enemy Act, at least until the right of seizure is definitely terminated by law. It follows that the plaintiff may not maintain the instant suit at this time.

The plaintiff argues that the proviso contained in the Joint Resolution was abrogated by "the events" which followed the approval of the said Resolution. We have carefully examined the documents upon which the plaintiff relies and we are of the opinion that the argument is without merit. We find nothing in these documents inconsistent with the proviso contained in the Joint Resolution. We therefore make only brief reference to these documents.

We must be guided in our interpretation of these documents by a fundamental principle of construction. It is well established that repeals "by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty." *Johnson v. Browne*, 205 U. S. 309, 321, 27 S.Ct. 539, 542, 51 L.Ed. 816; see also *United States v. Lee Yen Tai*, 185 U. S. 213, 22 S.Ct. 629, 46 L.Ed. 878; *Whitney v. Robertson*, 124 U. S. 190, 8 S.Ct. 456, 31 L.Ed. 386. A joint resolution regularly adopted and approved has the force and effect of a statute.

The plaintiff relies firstly, on the "Treaty of Friendship, Commerce and Consular Rights," ratified on July 21, 1953³ and concluded on November 5, 1954. This treaty makes applicable, "as a provisional measure pending the conclusion of a more comprehensive" treaty, the "Treaty of Friendship, Commerce and Consular Rights," concluded on December 8, 1923, 44 Stat. 2132.

The pertinent provision of Article I of the latter treaty reads as

¹ 50 U.S.C.A. Appendix, § 1 *et seq.*

² 65 Stat. 451; 46 A.J.I.L. Supp. 13 (1952).

³ U. S. Senate consent to ratification given July 21, 1953.—Ed.

follows: "The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law." This provision cannot be construed as a repeal of the Joint Resolution. The language reads *in futuro* and is consistent with the right preserved under the Joint Resolution, to wit, the right to seize and vest property subject to seizure and vesting prior to January 1, 1947.

The plaintiff relies secondly, on the "Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany," signed on October 29, 1954 and ratified on July 27, 1955.⁴ The pertinent provision of Article VI of this treaty reads as follows: "Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice * * * within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights." This provision, like the provision contained in the earlier treaty, cannot be construed as a repeal of the Joint Resolution. The language, as in the earlier treaty, reads *in futuro* and is consistent with the right preserved under the Joint Resolution.

The plaintiff relies finally on the "Bonn Occupation Agreements" of May 26, 1952 as amended by the "Paris Protocol" of October 23, 1954. There is nothing in these agreements which may be construed as a repeal of the Joint Resolution. It is to be noted that Article 3, paragraph 1, of the "Convention on the Settlement of Matters Arising out of the War and the Occupation" impliedly, if not expressly, recognizes the right preserved under the said Resolution. The pertinent language reads as follows: "The Federal Republic (of Germany) shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of a state of war * * *."

It does not follow, however, that the defendant is entitled to prevail on the present motion. A judgment under either Rule 12(c) or Rule 56(b) is essentially a judgment on the merits and may be entered only upon a conclusive determination of the issues of law. The only relief to which the defendant is entitled at this time is a dismissal of the action without prejudice; if and when the disqualification incident to the enemy status of the plaintiff is lifted, either by treaty or otherwise, the plaintiff may have a right to maintain its action in a court of competent jurisdiction.

The motion for judgment will be denied. The present action, however, will be dismissed, without prejudice to the right of the plaintiff to institute and maintain a new action when the disqualification is lifted.

NOTE: In *Farbenfabriken Bayer A. G. v. Sterling Drug, Inc.*, 148 F.Supp. 738, a companion case decided on the same day by the same judge, the same plaintiff sued the same defendant in a civil action under the antitrust laws for acts occurring within six years prior to the action and after January 1, 1947. Defendant relied on the Joint Resolution, *supra*. The court held that, inasmuch as the cause of action was not subject to seizure, the Resolution was inapplicable, and the defense was denied.

⁴ U. S. Senate consent to ratification given July 27, 1955.—Ed.

NOTES

Extraterritorial application of the antitrust laws—power to compel affirmative acts abroad

In *Holophane Co., Inc. v. U. S.*, 77 S.Ct. 144, 352 U. S. 903 (Nov. 13, 1956),¹ the Supreme Court in a *per curiam* decision affirmed the District Court decree, reported in 119 F. Supp. 114 (facts and opinion) and 1954 *Trade Cases* par. 67,679 (judgment and decree), unanimously except for paragraph XI, which was affirmed by an equally divided court. The District Court held defendant manufacturer of prismatic glassware and illuminating appliances to have engaged in an unlawful combination and conspiracy in restraint of trade under the Sherman Act. The illegal acts determined by the court constituted agreements between the defendant and two foreign corporations whereby the parties agreed to refrain from competing in each other's market areas. The decree enjoined the continuance of performance and the exercise of rights under these agreements and, in the disputed paragraph XI, compelled defendant to promote the sale and distribution of his product in foreign markets, except where it may violate foreign trademark laws, by circularizing and advertising in the countries where the two foreign corporations had their exclusive market, the availability in substantial quantities of its product. Paragraph XI also compelled defendant to offer his goods on non-discriminatory prices and conditions.

Income tax—foreign company carrying on a trade within the United Kingdom

The Firestone Tire and Rubber Company, incorporated in Maine and doing its major business in Akron, Ohio, had an agreement with various European distributors for exclusive dealerships. The American company fixed prices and undertook deliveries against ninety-day sight drafts. The master agreements between the distributors and the parent provided that the U. S. corporation would fill the orders obtained by the foreign subsidiary with the tires previously supplied to the subsidiary. In return for the solicited orders the subsidiary would receive the price paid to the parent plus a five percent commission. Such an arrangement was entered into with a British subsidiary known as Firestone Tyre and Rubber, Ltd., located at Brentford, Middlesex.

The Income Tax Act of 1918 provides the basis for the power to tax foreign corporations doing business in England. Schedule 10 of the Act provides that a principal will not be chargeable for the profits or commissions of his agent or broker in respect to profits or gains achieved through such brokers or agents. The American company claimed an exemption under this section.

The Court held, however, that the company was carrying on trade within the United Kingdom. At one point it stated (p. 701):

¹ For discussion of this case see editorial by Covey T. Oliver, 51 A.J.I.L. 380 (1957).

. . . the fact that an English company sells goods as a principal to the customers does not negative the proposition that the parent company, from which the goods emanated, may not equally be carrying on or exercising a trade within the United Kingdom.

Firestone Tyre and Rubber Co., Ltd. v. Lewellin (Inspector of Taxes) [1956] 1 All. E.R. 693 (United Kingdom, Court of Appeal, February 13, 1956, Lord Evershed, M. R., Jenkins and Birkett, L.J.J.).

Admiralty—jurisdiction—discretionary exercise with respect to foreign facts

Libel *in rem* against foreign ship by foreign cargo owners for claims arising out of high seas collision. The United States District Court for the Southern District of Florida dismissed the libel on the ground that jurisdiction in such controversies should be denied unless an injustice would be done. The Fifth Circuit reversed, holding the proper test to be that jurisdiction will be exercised unless to do so would work an injustice, and that the error below was so contrary to Supreme Court adjudications as to warrant setting it aside. *Motor Distributors v. Olaf Pedersen's Rederi A/S*, 239 F.2d 463 (U. S. Ct.A., 5th Circuit, Nov. 27, 1956, Tuttle, Ct. J.). Rehearing denied, Jan. 8, 1957.

Service on consul in suit against foreign state

Oster v. Dominion of Canada, 144 F. Supp. 746, digested in 50 A.J.I.L. 962 (1956), 51 *ibid.* 431 (1957), holding that service of process on the Canadian Consul in New York City did not confer jurisdiction in damage suit *in personam* against Canada, was affirmed, *Per Curiam*, without opinion in open court. *Clay et al. v. Dominion of Canada*, 238 F.2d 400 (U. S. Ct.A., 2d Circuit, Dec. 7, 1956).

Okinawa a "foreign country" for purposes of the Federal Tort Claims Act—Wake Island place "abroad" under Immigration and Nationality Act

In *Burna v. United States*, 240 F.2d 720 (U.S. Ct.A., 4th Circuit, Jan. 7, 1957, Sobeloff, Ct. J.), Okinawa was held to be a "foreign country" within the exclusion of "any claim arising in a foreign country" by Section 2680 (k) of the Federal Tort Claims Act. The decision below, 142 F. Supp. 623, to the same effect is noted in 51 A.J.I.L. 110 (1957). See also *In re Petition of Willess*, 146 F. Supp. 217 (U. S. Dist. Ct. Hawaii, Dec. 10, 1956, McLaughlin, C.J.), holding Wake Island to be a place "abroad" under Sec. 319 (b) of the Immigration and Nationality Act, 8 U.S.C. § 1430(b).

Foreign commerce—jurisdiction

In *Londos v. United States*, 240 F.2d 1 (U. S. Ct.A., 5th Circuit, Jan. 9, 1957, rehearing denied, Feb. 20, 1957, Tuttle, Ct. J.), "foreign com-

merce" within the meaning of 18 U.S.C. § 10, which was defined as including "commerce with a foreign country," was held to include transportation from the foreign country into the United States.

Customs duties—indirect import—applicable tariff

Goods in question were originally imported into the United States from the Soviet Zone of Germany and cleared through customs. They were subsequently exported to the Western Zone of Germany for repairs. Upon reimportation into the United States, the higher rate applicable to Soviet Zone imports was again applied. Importer sued to obtain rate applicable to imports from Western Zone. The Customs Court held that the goods were entitled to the reduced rate of duty. *Camera Specialty Co. v. United States*, 146 F. Supp. 473 (Customs Court, First Division, Jan. 20, 1955, Wilson, J.). See also *Chemo Puro Mfg. Corp. v. United States*, 146 F. Supp. 178 (Customs Court, First Division, Dec. 29, 1954, Wilson, J.), where tannic acid produced in the United Kingdom from nutgalls originally obtained in Communist China was held not to be an indirect import from the latter.

Executive agreements—Presidential proclamations—trade agreements not self-executing

In *American Bitumuls & Asphalt Co. v. United States*, 146 F. Supp. 703 (Customs Court, First Division, Aug. 24, 1956, Mollison, J.), it was held that tariff rates under the Trade Agreements Act become effective only by Presidential proclamation and not by virtue of the executive agreement itself, and this was equally true whether the proclamations followed a trade agreement or terminated an earlier proclamation. Presidential termination of the agreement did not in itself change the internal law in force.

Admiralty—Jones Act—control of foreign corporate-owned ship by U. S. citizens

In *Argyros v. Polar Compania de Navegacion, Ltda.*, 146 F. Supp. 624 (U. S. Dist. Ct., S.D.N.Y., Nov. 2, 1956, Edelstein, D. J.), a libel by seaman, a Greek resident and national, under the Jones Act, 46 U.S.C. § 688, against Panamanian corporate shipowner for injuries sustained on the high seas, libellant moved to examine corporate books to determine whether U. S. citizens had "control." Libellant argued such "control" would make the Jones Act applicable. The motion was denied on the ground that such "control" was not in itself sufficient ground for applying the Act.

Transaction with corporation of unrecognized government in violation of regulation of recognized government—contracts

In *Banking and Trading Corp. v. Reconstruction Finance Corp.*, 147 F. Supp. 193 (U. S. Dist. Ct., S.D.N.Y., Nov. 30, 1956, Walsh, D. J.), a purported transaction between the R.F.C. and an Indonesian corporation was

held, alternatively, to be no contract, or rescinded, on the ground an export permit from the Netherlands authorities recognized by the United States was a prerequisite.

Passport—due process—denial on basis of confidential information

In *Dayton v. Dulles*, 146 F. Supp. 876 (U. S. Dist. Ct., Dist. of Col., Dec. 21, 1956, McGarraghy, D. J.), plaintiff's application for a passport was denied under Sec. 51.135 (c) of the Passport Regulations by a decision of the Secretary of State which contained findings based on record information, and findings based (a) on confidential information disclosure of which would prejudice internal security investigation methods, and (b) on confidential information disclosure of which would prejudice the conduct of foreign relations. The regulation was upheld and the decision of the Secretary was held not to violate substantive or procedural due process.

Foreign adoption—rights of a foreign adopted child domiciled in a foreign country under an English will

Testator by will, dated April 12, 1945, left the residue of his estate in trust for his wife, and after her death to certain named cousins or their "issue then living." One of the cousins had emigrated to British Columbia, Canada, with his wife and, in 1913, had taken one child into the family. No legal provisions for adoption were then available. As to this child no formal adoptive steps were ever taken. On March 9, 1945, the couple adopted another child under the laws then in force in British Columbia. The testator died on June 14, 1945. The testator's wife died on January 10, 1955, while the parent of the adopted child died in February of 1950. The question arose whether both or either of the children were "issue" of the cousin so as to take under the provisions of the will.

As to the foster child no provisions exist under English or Canadian law for inheritance under a will.

As to the adopted child, the court held that the crucial date was June 14, 1945, the date of the testator's death, and not January 10, 1955, the date of the wife's death. The court stated that even though the interest in the remainder did not vest until the testator's widow's death, the date for determining the members of the class capable of taking under the will should be determined on the day the will became effective. Further, the court found that the law of the domicile of the child controlled its rights and not the law of the domicile of the testator. In 1945, when the testator died, the laws of British Columbia excluded any adopted child from inheritance or succession from other than his parents by adoption. Adoption Act, 1920 § 10(1). Therefore, the court concluded that the second child was equally barred from taking under the will and that the revised Adoption Act of 1953 could not apply. *Re Marshall (deceased)*, [1957] 1 All. E.R. 549 (United Kingdom, Ch. Div., Feb. 6, 1957, Harman, J.).

International aviation—Warsaw Convention—proper court for damage action—"doing business"

In *Berner v. United Airlines*, 157 N.Y.S.2d 884 (N.Y.Sup.Ct., App. Div., Dec. 18, 1956, Bergan, J.), denial of motion to vacate summons was affirmed in action *in personam* for wrongful death under Warsaw Convention,¹ 49 Stat. 3000 *et seq.*, on the ground that all the circumstances surrounding the sale of ticket in New York to decedent through agent of defendant Australian airline made the New York Supreme Court a proper forum under Article 28 of the Convention, New York being a "place of business through which the contract has been made," and the agency contract showed defendant corporation was "doing business" in New York. See also *In re Waldrep's Estate*, 306 Pac.2d 213 (Sup.Ct., Wash., Jan. 28, 1957, Foster, J.), holding the Washington courts a proper forum under Article 28 as "the Court at the place of destination."

Indian tribes—original Indian title not compensable—recognized title—eminent domain—standing to sue

In *St. Regis Tribe of Mohawk Indians v. State*, 158 N.Y.S.2d 540 (Ct.Cls., N.Y., Dec. 27, 1956, Lambiase, J.), Indian tribe sued in New York Court of Claims for compensation for taking of claimed lands. The court held, *inter alia*, that original Indian title was not compensable but that a recognized right of permanent occupancy was compensable. Conceding no right to sue in absence of statute, the New York statutes providing in general terms for eminent domain were held to provide the requisite statutory authority. See also *Allen v. Merrell*, 305 Pac.2d 490 (S.Ct., Utah, Dec. 15, 1956, Crockett, J.), in which Utah statute declaring Indian living on Indian reservation not a resident for voting purposes was upheld against constitutional attack.

Conflict of laws—governing law for distribution—illegitimacy under Danish law

Intestate, of Danish origin, died a resident of New York leaving realty and personalty for distribution. Johanne Krabbe, daughter of decedent's sister, and a resident of Denmark, claims Danish law determines whether she is distributee. The court held New York law rather than Federal or Danish law determines whether she is distributee, and, under New York law, illegitimates do not inherit through the mother. Danish law, however, applied in determining that she was not legitimate. *In re Krabbe's Estate*, 158 N.Y.S.2d 551 (Surr. Ct., Suffolk County, N.Y., Jan. 4, 1957, Hazleton, S.).

Copyright—United States Forces in Iceland—damages for broadcasting compositions without permission

Plaintiff, Icelandic agent for various composers of foreign countries, including the United States, brought suit for damages against the Ice-

¹ U.S. Treaty Series, No. 876.

landic Minister of Finance and the United States Defense Force in Iceland. The gravamen was the playing of copyrighted tunes without permission and the payment of royalties. With respect to composers who were nationals of states parties to the Berne Convention,¹ the unauthorized broadcasts were held to violate the Icelandic legislation enforcing said convention and the legislation providing for payment of claims for damages inflicted on Icelandic persons by members of the United States Force. With respect to the U.S. composer, member of ASCAP, of which plaintiff was agent, it was held that, since ASCAP's offer to the President of the United States in 1950 for free broadcasting during the "crisis" had not formally been withdrawn, and since the court would not pass on whether the "crisis" had passed, plaintiff's claim had not been proven. *STEF v. Minister of Finance et al.*² (Town Court, Reykjavik, Iceland, Nov. 7, 1956, Arnalds, J. .

AMERICAN CASES ON ENEMY PROPERTY AND TRADING WITH THE ENEMY

Epstein v. Brownell, 146 F.Supp. 405 (E.D.N.Y., Dec. 5, 1956), payment of taxes by custodian; *Royal Exchange Assur. v. Brownell*, 146 F.Supp. 563 (S.D.N.Y., Nov. 21, 1956), British trusteeship of German property; *Brownell v. Schering Corp.*, 146 F.Supp. 106 (D.C.N.J., Nov. 21, 1956), definition of "qualified applicant"; *Brownell v. Hartford-Connecticut Trust Co.*, 147 F.Supp. 929 (D.Conn., Oct. 31, 1956), effect of German remainderman; *In re Neumeister's Estate*, 304 Pac.2d 67 (C.A.Calif., Nov. 27, 1956); *In re Zuber's Estate*, 304 Pac.2d 247 (C.A.Calif., Dec. 4, 1956); *In re Russell's Estate*, 159 N.Y. S.2d 651 (Surr.Ct. N.Y., Dec. 31, 1956); *Farbenfabriken Bayer, A. G., v. Sterling Drug, Inc.*, 148 F.Supp. 733, 738 (D.N.J., Feb. 5, 1957), digested *supra*, p. 639.

AMERICAN CASES ON NATIONALITY

Citizenship. Wong Gong Fay v. Brownell, 238 F.2d 1 (9th Cir., Oct. 31, 1956), standard of proof; *Mendoza-Martinez v. Mackey*, 238 F.2d 239 (9th Cir., Nov. 2, 1956), departure from U. S. to avoid draft resulting in loss of nationality; *Gravert v. Dulles*, 239 F.2d 60 (Dist. of Col. Cir., Nov. 9, 1956), jurisdiction over determination of citizenship; *Giz v. Brownell*, 240 F.2d 25 (Dist. of Col. Cir., Dec. 13, 1956), effect of failure by student to apply for determination of non-residence; *Soo Hoo Doo Wing v. Dulles*, 147 F.Supp. 862 (D.Conn., Nov. 2, 1956), consul general's refusal to issue travel documents, effect on citizenship determination; *Cepo v. Brownell*, 147 F.Supp. 517 (N.D. Calif., Dec. 21, 1956), denaturalization of grandfather does not affect derivative citizenship; *Manha v. Brownell*, 146 F.Supp. 411 (N.D. Calif., Nov. 19, 1956), cancellation of citizenship resulting in loss of derivative citizenship of son; *Gee Chee On v. Brownell*, 146 F.Supp. 503 (S.D. Tex., Dec. 6, 1956).

¹ 77 British and Foreign State Papers 22.

² Material made available through courtesy of Howard E. Hensleigh of Washington, D. C.

Deportation. Effect of application for relief from military service, *Ceballos v. Shaughnessy*, 352 U. S. 599 (March 11, 1957); membership in Communist Party: *Bonetti v. Brownell*, 240 F.2d 624 (Dist. of Col. Cir., Dec. 27, 1956), *Niukkanen v. Boyd*, 148 F.Supp. 106 (D.Ore., March 2, 1956), *Schleich v. Butterfield*, 148 F.Supp. 44 (E.D.Mich., Jan. 16, 1957), *Bovinas v. Savoretti*, 146 F.Supp. 274 (S.D.Fla., Nov. 28, 1956) (Communist Party in relationship to Socialist Party); moral turpitude: *Ablett v. Brownell*, 240 F.2d 625 (Dist. of Col. Cir., Jan. 10, 1957), *U. S. ex rel. Brancato v. Lehmann*, 239 F.2d 663 (6th Cir., Nov. 21, 1956), *Chanan Din Khan v. Barber*, 147 F.Supp. 771 (N.D. Calif., Jan. 31, 1957) (income tax violation); *Medeiros v. Brownell*, 240 F.2d 634 (Dist. of Col. Cir., Jan. 17, 1957), weight given to admissions by alien; *Coelho v. Brownell*, 240 F.2d 635 (Dist. of Col. Cir., Jan. 17, 1957), sufficiency of documentary evidence without a hearing; *U. S. v. Heikkinen*, 240 F.2d 94 (7th Cir., Jan. 17, 1957), duty of alien to leave country after deportation order; *U. S. ex rel. De La Fuente v. Swing*, 239 F.2d 759 (5th Cir., Dec. 21, 1956), admission of crime; *U. S. ex rel. Pierropoulos v. Shaughnessy*, 239 F.2d 784 (2nd Cir., Jan. 3, 1957), entry without properly visaed passport; *Landon v. Clarke*, 239 F.2d 631 (1st Cir., Dec. 17, 1956), false representations of marital status; *Fitzgerald ex rel. Miceli v. Landon*, 238 F.2d 864 (1st Cir., Dec. 17, 1956), effect of conviction; *Chang Ah Ding v. U. S.*, 239 F.2d 852 (5th Cir., Jan. 9, 1957), refusal to delay hearings for reason of obtaining files; *Wolf v. Boyd*, 238 F.2d 249 (9th Cir., Oct. 24, 1956), discretion of board in reopening deportation proceedings; *Ellis v. Berman*, 238 F.2d 235 (2nd Cir., Nov. 2, 1956), writ of habeas corpus on evidence problem; *Mannerfrid v. Brownell*, 238 F.2d 32 (Dist. of Col. Cir., Oct. 18, 1956), draft exemption claim; *Ex parte Domingosil-Mercado*, 146 F.Supp. 909 (N.D.Calif., Oct. 8, 1956), residence in Hawaii; *Vallejos v. Barber*, 146 F.Supp. 781 (N.D. Calif., Nov. 26, 1956), status of Philippine natives who left prior to the Philippine Independence Act; *U. S. ex rel. Partheniades v. Shaughnessy*, 146 F.Supp. 772 (S.D.N.Y., Dec. 5, 1956), grounds for reopening deportation proceedings; *U. S. ex rel. De La Fuente v. Swing*, 146 F.Supp. 648 (S.D. Tex., Feb. 20, 1956), perjury before commissioner; *U. S. ex rel. Lue Chow Yee v. Shaughnessy*, 146 F.Supp. 3 (S.D.N.Y., Nov. 15, 1956), parole from physical persecution in foreign country; *U. S. ex rel. Hintopoulos v. Shaughnessy*, 353 U. S. 72 (March 25, 1957), exercise of discretion in denying suspension of deportation.

Naturalization. *Preisler v. U. S.*, 238 F.2d 238 (2nd Cir., Nov. 2, 1956), good moral character; *Boufford v. U. S.*, 239 F.2d 841 (1st Cir., Dec. 5, 1956), use of word "marriage" in application for naturalization; *In re Nissen*, 146 F.Supp. 361 (D.Mass., Nov. 20, 1956), refusal to bear arms; *Petition of Tchakalian*, 146 F.Supp. 501 (N.D.Calif., Dec. 7, 1956), status of alien serving in U. S. Army; *Petition of De Mago*, 146 F.Supp. 759 (N.D.Calif., Dec. 7, 1956), utilization of time served in U. S. Army in computing residence; *Petition of Ogmistoff*, 146 F.Supp. 205 (N.D. Calif., Oct. 12, 1956), effect of service in National Guard; *Petition of Gourary*, 148 F.Supp. 140 (S.D.N.Y., Jan. 28, 1957), effect of relief from military service;

In re Hansen, 148 F.Supp. 187 (D.Minn., Feb. 8, 1957), refusal to take oath to perform military service for religious reasons; *Petition of Chow*, 146 F.Supp. 487 (S.D.N.Y., Dec. 14, 1956), use of terms "entry" and "lawful admission"; *Petition of Willess*, 146 F.Supp. 217 (D.Hawaii, Dec. 10, 1956), status of Wake Island, cited *supra*, p. 643; *Petition of Flores*, 147 F.Supp. 259 (S.D.N.Y., Dec. 20, 1956), alien seamen; *In re Howard's Petition*, 147 F.Supp. 676 (W.D.Mo., Dec. 20, 1956), use of "person" and "child"; *In re Che-Tong Song*, 147 F.Supp. 879 (W.D.Ark., Jan. 29, 1957), burden of proof.

Denaturalization. Laches in setting aside denaturalization order: *Sciria v. U. S.*, 238 F.2d 77 (6th Cir., Oct. 18, 1956), *Leung Gim v. Brownell*, 238 F.2d 77 (9th Cir., Oct. 30, 1956); *Nowak v. U. S.*, 238 F.2d 282 (6th Cir., Nov. 26, 1956), affidavit by attorney of immigration service of facts in official records in re affidavit of good cause; *U. S. v. Milana*, 148 F.Supp. 152 (E.D.Mich., Jan. 16, 1957), must comply with State law on summons via publication.

Expatriation. *Trop v. Dulles*, 239 F.2d 527 (2nd Cir., Dec. 28, 1956), desertion in time of war as grounds for expatriation.

Passport. *Dayton v. Dulles*, 146 F.Supp. 876 (Dist. of Col., D.Ct., Dec. 21, 1956), validity of denial of passport on basis of undisclosed source of information, digested *supra*, p. 645.

Refugee Relief Act. *Ching Lan Foo v. Brownell*, 148 F.Supp. 420 (Dist. of Col., D.Ct., Feb. 8, 1957), American ship on high seas considered part of U. S. territory for purposes of alien being "physically present in U. S."

Miscellaneous. *U. S. v. Seaboard Surety Co.*, 239 F.2d 667 (4th Cir., Jan. 7, 1957), use of word "pay off" under the Immigration Act; *Haerr v. U. S.*, 240 F.2d 533 (5th Cir., Jan. 16, 1957), search and seizure by the Border Patrol.

BOOK REVIEWS AND NOTES

Académie de Droit International. Recueil des Cours, 1952. Vols. I and II (Tomes 80 et 81 de la Collection). Paris: Recueil Sirey, 1952. pp. vi, 642; vi, 736. Indexes. Fl. 40 each.

At the Academy of International Law in 1952 there were thirteen lecturers, none of them from the United States. With the exception of one from Latin America and one from Israel, all were from Western Europe—though one is an international official. Three lectures are in English, the rest in French. Three of the subjects are “general principles”—of international public law, international private law, and air law. One lecture considers the nature of international law, another a phase of its history, another its relation to national constitutions. Several relate to international organizations and their problems, several to sanctions and neutrality.

Professor Paul Guggenheim of Geneva gave the survey of the field of international law. Some eighty of his two hundred pages are devoted to the nature, sources and interpretation of international law; some fifty more to the subjects of international law; and the rest to responsibility, jurisdiction, and problems of the law of war. He raises current questions and gives concrete answers; his outlook is sensible and well balanced; he is not inclined to pursue a will o' the wisp.

Professor Louis Cavaré, of Rennes, under the heading *Les Sanctions dans le Cadre de l'O.N.U.*, discusses, with more optimism than this reviewer feels, the United Nations as a legal order, and the way in which violations of the law of the community of nations are handled. He regards the Charter as “*un système cohérent, souple et très poussé, rendu possible dans un régime de légalité*”; but he points out a number of omissions in the Charter, and observes that the system cannot be strengthened until some agreement upon disarmament of Members is reached and until the paralysis of the Security Council, due to the veto, can be remedied.

A comparative study of the process of admission to the League of Nations and to the United Nations is provided by Professor Nathan Feinberg, of Jerusalem. It was written before the deadlock on membership in the United Nations was broken, and surveys the controversy in terms of official records and in comparison with the League of Nations. There is a short chapter on something not in the Covenant or Charter: readmission; and another on membership with limited rights. The discussion of “universality” is particularly interesting.

Professor Titus Komarnicki of Poland, now in London, spoke on *The Place of Neutrality in the Modern System of International Law*. It is a compact and useful survey, as much a study of collective security as of neutrality, with wide reading behind it. He emphasizes certain factors: the rise of the United States and its policy of neutrality; the balance-of-

power system; the limited scope of wars in the 19th century; the effort of Great Britain and others to localize international conflicts; the lack of any protection by the community of nations for territorial integrity and political independence. He considers various stages of intermediacy and non-belligerency suggested by Quincy Wright, Cavaglieri, Whitton, Lauterpacht, the International Law Association and others, and concludes that it will never be possible "to assure for the status of non-belligerency coupled with partiality such hard and fast rules as was the case in the past for the status of neutrality." He is uncertain about neutrality in the next war, partly because of collective security and partly because of current challenges to international law. There is a great deal of interesting matter in this lecture.

Les Tendances internationales des Constitutions Modernes is the title of the lectures given by Professor Paul de Visscher of Louvain. He begins with the warning that constitutions do not have their former juridical purity, that some are written for propaganda purposes, and that more than ever one must ascertain how they are used in practice. He finds three levels of the submission of internal law to international law. The Spanish Constitution puts upon the legislator the duty to conform internal law to international law, but there is no judicial sanction. The Anglo-Saxon phrase "international law is part of the law of the land" is just a rule found in all civilized states. It is rare to find a constitution, such as that of 1949 in Germany, which clearly puts international law above internal law; even so, it depends upon the power of the judge. In general, he asserts, constitutional guarantees depend upon procedure rather than upon the written text. He suggests also that constitutional reforms are needed to improve modern treaty-making, and these should assure popular approval.

Professor Rolando Quadri of Italy asks why the rules of international law are obligatory. He finds no basis in morality, or in positivism, or in such an hypothesis as Kelsen's *Grundnorm* or Triepel's *Vereinbarung* (which he calls an upside-down pyramid); nor in the mere fact that states regard the law as obligatory, for that statement must be reversed. The authority of the law comes from the fact that individuals living in a community are necessarily subordinate to this collective entity. There can be no such thing as absolute sovereignty, for the social body imposes its will upon the most dissident. Dr. Quadri, however, does not wish this theory to be confused with the monist theory of the primacy of international law.

The last of the lectures found in Volume I (Tome 80) is by Dr. Hanna Saba of Egypt, now Legal Adviser to UNESCO. He discusses in a very common-sense way regional arrangements under the Charter of the United Nations. That institution, he says, does not have a monopoly of maintaining peace; at San Francisco the idea was rejected that each regional arrangement should be approved by the United Nations. So there is no authoritative way to define or determine what is a regional arrangement under the Charter, and no organ to make such a decision. He examines various existent groupings in their relation to the United Nations and is

aware of the dangers to it of their growth. These dangers he thinks, can be avoided only by making the United Nations stronger.

The second volume (Tome 81) begins with *Le Droit International Privé des Etats Américains*, by Haroldo Valladão of Brazil. It is a hundred and ten-page survey, from the viewpoint of comparative law, of international private law in the Americas. It considers, in some detail, the internal laws of the various American states (including the United States), and carries on into international law and treaties. Dr. Valladão has done wide reading; he goes into details concerning various codes and writers; he is particularly enthusiastic concerning the Civil Code of Chile, prepared by Bello. In the last chapter, he takes up the American efforts to codify international private law and comes to the conclusion that no great progress has been made since 1878. Indeed, he thinks that an international private law for all countries is as much a Utopia as a civil law for all nations—"même pour les Amériques."

Professor Max Sørensen of Denmark took as his subject *Le Conseil de l'Europe*, an institution which he regards as important both as a pillar in the political structure of Europe and as a new kind of international organization. It is distinctive in various ways. Some amendments can be made by the Committee and Consultative Assembly, without ratification, though a member can withdraw. Only the Committee of Ministers can invite to membership. This Committee is composed of persons of ministerial rank from each government; this is rather a burden and he suggests that each government should set up a Ministry for European Affairs. This Committee has legislative powers but only in the usual sense of drafting treaties for ratification. The desire that members of the Consultative Assembly should be independent of their governments would produce confusion in foreign policy, so it was left that each government should designate its members as it wishes; he favors members who conform with the policy of their governments. It is an experiment in the sense of knowledge acquired through practice.

Questions of Public International Air Law are discussed by Daniel Goedhuis of The Netherlands. Consideration of these questions results in an informative and comprehensive survey of the development of air law. This law started with the idea that rules applicable to other transport could be used for aviation, but with development, the pendulum swung in the other direction—too far, according to Mr. Goedhuis. "In the technical field, one lives in the future, but in the economic field rules are being laid down which show little or no regard to their influence on that future." It requires much investment to keep up with progress, and such investment is not likely so long as the system is built upon shaky bilateral foundations; consequently, governments must help. The publicists, he notes with apparent regret, have now retreated from earlier enthusiasms to national sovereignty. He has a chapter on possible solutions, but concludes that we must wait on technological process and meanwhile strive for ordered competition and teach nations that it is not possible "to have it both ways."

Professor Alejandro Herrero of Spain gives a thoughtful but quite pessimistic account of *Le Droit des Gens dans l'Espagne du XVIIIème Siècle*. The writers whose work he surveys are practically unknown names and he regrets and seeks to explain why the admirable work of such earlier persons as Victoria had not been followed up in Spain.

The Regulation of the Use of Force by Individual States in International Law is discussed by Professor C.H.M. Waldock of Oxford. He explains that he is not considering collective security; actually, he is asking how much right is left to individual states to use force. This is closely related to pacific settlement, for, he observes, a state which unilaterally upholds its right by refusing to settle is as obnoxious as one which maintains its right by force. Up until the present century, forcible self-help short of war was permissible though regulated, but the League of Nations and United Nations and other developments have changed this. Aggressive war is now a crime and therefore a definition of aggression is needed for purposes of judicial determination—though not so essential for determination by the Security Council under Article 39 of the Charter. He gives an interesting analysis of the Corfu Channel opinion of the Court, and concludes that it upheld self-defense but denied self-help. Professor Waldock doubtless did not have Nasser in mind as he wrote, but what he says is relevant to the later intervention of England and France in Egypt.

Le Plan Schuman, by Paul Reuter of Paris, concludes the volumes for 1952. This plan, he says, represented a change in the psychology of France; and the Coal and Steel Community a similar change with regard to international organizations. He discusses the Plan under the headings of the institutions (and their supra-national characteristics), the regime over coal and steel, and concrete applications thereof and concludes that the system is more political than economic. While limited to coal and steel, these are factors so important as to allow for much "dynamism." Like Professor Sørensen with regard to the Council of Europe, he is somewhat uncertain as to the future of this experiment; it depends upon the ability of man's intelligence to triumph over confusion.

CLYDE EAGLETON

The Law of War and Neutrality at Sea. By Robert W. Tucker. (U. S. Naval War College, International Law Studies, Vol. XLX.) Washington, D. C.: Government Printing Office, 1957. pp. xiv, 448. Index. \$2.25.

As an international lawyer, a reserve officer in the U.S. Navy and a Consultant to the U.S. Naval War College, Professor Tucker drafted the U.S. Navy Instructions on the Law of Naval Warfare, a draft which is both excellent as to contents and subtle as to theory. Now he has written a treatise on the law of war and neutrality at sea, published as the fiftieth volume of a series inaugurated by the Naval War College in 1894. This treatise stands in close relation to the U.S. Navy Instructions which are fully reprinted in the Appendix (pp. 357-422).

It was not the intention of the author to give an absolutely complete treatise on this topic. He concentrates on the newer developments, on the actual problems. He does not give a complete bibliography, but makes use of all the important modern literature in the different languages, of important Prize Court decisions and of the jurisprudence of international and national war crimes tribunals. He fully investigates the formal and substantive law of prize, but omits a detailed analysis of the Prize Court decisions of World War II, not only because they are fewer in number than those of World War I, but also because they have added little to the formal and substantive law of prize developed by the decisions of the first World War.

Both as to methods and as to contents, the author is in very many points in close agreement with the ideas developed and defended by this reviewer. First of all, the author, like the U.S. Navy Instructions, shows that the recent change in the legal position of war has by no means eliminated the laws of war. They not only continue, but their applicability has been largely extended by the corresponding clauses of the Geneva Conventions of 1949. The laws of war, furthermore, apply equally and without discrimination for and against the legal and illegal belligerent, the aggressor and U.N. troops, as corroborated by the practice of states in the armed conflict in Korea. The author gives not only the practical reasons and the status of the U.N. Security Council, but tries also to present the theoretical reasons by a subtle inquiry into the maxim "*Ex injuria jus non oritur.*"

Equally, as far as the law of neutrality is concerned, the author recognizes its present decline, but holds, in harmony with the U.S. Navy Instructions, that the law of neutrality is far from dead. Starting from what this reviewer has called the present "chaotic status" of the laws of war, the author makes it his principal task to evaluate impartially and objectively the impact of the two world wars on the traditional law. He fully recognizes the difficulty of this task: On the one hand, it is not possible to say that the practice of states during the two world wars was nothing but "lawlessness." What originally started in violation of the traditional law, may have had a revolutionary, law-creating effect and have led to new rules; a case in point is the deviation of merchant vessels into port for visit and search; the author also holds that the principle of ultimate enemy destination is undoubtedly valid. On the other hand, the traditional law may still be valid, so that the contrary practice had no law-creating effect, but must also today be considered as a mere violation of law; that is the case as far as the sinking without warning and without attempt to save the lives of men of neutral merchant vessels by belligerent submarines is concerned. The author, like this reviewer, recognizes the unchanged validity of the London Protocol of 1936. But there is also a vast area of uncertainty of the law at this time, especially where a constant practice, contrary to the traditional law, has only been justified as measures of reprisal, and, therefore, recognized as unlawful *per se*: this is the case, for instance, of the so-called "blockade" measures of belligerents.

The author fully investigates the well-known reasons which explain the change of practice, but correctly adds that it is one thing to inquire into the causes of states' behavior—a factual inquiry—and quite another thing to determine—a normative inquiry—whether or not this behavior has actually resulted in invalidating a given rule or rules. Consequently it is not always possible today to state the law actually in force with complete assurance, certainty and precision. The author takes the traditional law as his starting point, then objectively evaluates the materials actually at hand from the point of view of their impact upon this traditional law. In a similar way, Julius Stone in his *Legal Controls of International Conflict* gives in his chapters the traditional law system and in his critical Discourses the materials which challenge this system. This is, no doubt, a good method for producing a thoroughly modern textbook on the laws of war and neutrality.

It is by this method that the author in the two parts of the book fully investigates all the problems of the law of naval warfare and of maritime neutrality. It is not possible to give a report here on the handling of all the problems by the author. Only a few examples can be mentioned. Must not the introduction of armed merchant vessels, armed even for offensive purposes, the growing integration of belligerent merchant vessels into the navy of a belligerent, lead to a change of law? Can the law which forbids a neutral state, but not a neutral trader, to engage in carrying contraband—a law based on the clear-cut distinction between state activities and genuine private trade—be upheld, when newer developments make this distinction more and more problematic? The traditional law obliges a neutral state to make use of "all the means at its disposal" to prevent violations of its neutrality. But what is the legal position if the neutral state has *bona fide* made use of all the means at its disposal and has therefore fulfilled its legal duty, but is simply too weak to prevent violations of its neutrality by one belligerent? On the other hand, does not a neutral state which accepts "navicerts" by one belligerent, make itself guilty of unneutral service? "Germany," the author states, "would have been on solid ground in seizing and condemning neutral merchant vessels during both World Wars for the mere act of sailing with navicerts issued by the Allied authorities." (p. 323.)

The author clearly distinguishes—a distinction not always made—between the illegality *per se* of a weapon and the merely illegal use of an otherwise perfectly legitimate weapon (*e.g.*, the submarine). In this sense he defends the present legality of nuclear weapons used exclusively against military forces. On the other hand, he is of the opinion that the illegality of the use of poisonous and asphyxiating gases is today—quite apart from treaty—already based on a norm of customary general international law; this is, by the way, the only point in which the treatise differs from the U.S. Navy Instructions. The author emphasizes that it is still the law that belligerent actions, including aerial bombardment, must not be directed against the civilian population, must not be made for the mere purpose of terrorizing the civilian population. But he brings out sharply that this rule, although valid, is in danger of becoming an

empty formula, as long as it is also the law that the belligerent must not refrain from such bombardment because of the possibility of "incidental" damages to civilians and there is no standard or authoritative decision as to which damage is "incidental."

Using this method of taking the traditional law as the starting point and evaluating the impact of recent developments upon the traditional law, and handling this method with full scientific knowledge, with deep theoretical understanding, with impartial objectivity and with great caution as to prediction, the author has given us a modern and excellent treatise, destined to hold a prominent place in the growing modern literature on the laws of war.

JOSEF L. KUNZ

International Law for Seagoing Officers. By Commander Burdick H. Brittin, U.S.N. In collaboration with Dr. Liselotte B. Watson and Lt. Horace B. Robertson, U.S.N. Annapolis: U.S. Naval Institute, 1956. pp. xiv, 256. Index. \$4.50.

The author of the book under review is a U.S. Navy Officer of the Line and international lawyer, who has just served as Director of the Division of International Law in the Office of the Judge Advocate General of the Navy. The book is written for the junior officer, already on duty at sea, whether of the U.S. Navy, U.S. Coast Guard or Merchant Marine. As the author states, the importance of international law for the seagoing officer cannot be overemphasized. The book is admittedly elementary and simplified. It contains a glossary, a short, and perhaps not adequate bibliography, illustrations, special diagrams and useful maps. It is enlivened by a wealth of case histories contributed by Flag Officers of the U.S. Navy. It gives in ten appendices the texts of the second and third Geneva Conventions of 1949, of the U.S.-Japan Security Treaty, NATO, SEATO, the Rio Treaty, the U.S.-Brazil Naval Mission Agreement, the U.N. Charter, the NATO Status of Forces Agreement and a highly interesting list of the breadth of territorial waters and contiguous zones claimed by the nations of the world.

The book tries to give in 141 pages of text an elementary introduction to international law from its definition, history and sources to collective security, war and neutrality. It is in the first chapters that some inaccuracies or errors can be found. We state them, not for pedantic reasons, but in order that they may be corrected in a second edition: Andorra (p. 19) is hardly a sovereign state. It is a common error to say that the "creation of Vatican City restored full sovereignty to the Pope" (p. 19). Among the permanently neutral states Austria should be listed (p. 20). The paragraph on protectorates is open to many objections (p. 20). It is not correct to hold that "the Commonwealth itself has been considered to enjoy a sovereign status of its own" (p. 21). It is also no longer correct to state that the members of the Commonwealth are bound together by "a common monarch" (p. 20). The Crown is no longer one; in addition India, for example, is a Republic, recognizing the Queen only as

"Head of the Commonwealth." It is not correct to state that "to assume sovereign status a new State must be recognized" (p. 23). The whole paragraph on the recognition of new governments (pp. 23-34) would have to be rewritten.

While the author tries to give the elements of all parts of international law, naturally problems of special interest to seagoing officers hold a prominent place. Relatively full and very good discussions are to be found on Antarctica, on leases for air and naval bases, on air defense identification zones, on the sector principle in the Arctic, the three-mile limit, the law of territorial waters, the law of the high seas, fishing conservation zones, continental shelf, the Rhee Line controversy, warships and merchant vessels on the high seas, in foreign territorial waters and ports, personnel on board and on shore, jurisdiction over armed forces, the law of naval warfare, security treaties.

Throughout, the author takes a strong stand in favor of international law as a living law, in favor of the continued validity of the laws of war and the continued distinction between armed forces and civilian population, and in favor of international organizations. He emphasizes that the United States regards international law to be of the utmost importance in general, and hence for all persons in the naval service.

The book under review corresponds to a practical need; it is a useful book and, apart from a few errors, fully adequate for the purposes for which it was written. It contains pages which are also of interest to the professional international lawyer.

JOSEF L. KUNZ

Comunicazioni e Studi. Vol. VII. Istituto di Diritto Internazionale e Straniero, Università di Milano. Milan: Dott. A. Giuffrè, 1956. pp. iv, 796. L. 4500.

The seventh volume of this annual Italian publication, excellently directed by Professor Roberto Ago, and, as always, beautifully printed and bound, again contains a great number of book reviews, valuable reports on the Italian doctrine of conflict of laws (Bentivoglio) and of international law (Malintoppi), Italian court decisions in both fields (Zannini, Fabozzi) and on the jurisprudence of the International Court of Justice (Migliazza), as well as eight studies. These studies are all interesting and valuable.

Ziccardi writes on the object of qualifications (pp. 365-435), Parini on the relations between Italy and the other states in the matter of the protection of industrial property (pp. 299-363). Cansacchi once more deals with the problem of the continuity of the Papal State, in a new and subtle form (pp. 97-142). Durante surveys the doctrine of the continental shelf apropos of the corresponding Italian draft statute, which ascribes to Italy only a limited, although exclusive, right in the continental shelf for the research, cultivation and protection of the *mineral* resources. Here we have a formulation, presenting the new claim in the narrowest interpretation of the Truman Proclamation and thus anxious

to respect the interests of the international community in the various uses of the high seas.

Two very interesting articles deal with problems of the law of international organizations. Capotorti (pp. 143-198) treats the competence of organs of international organizations to conclude treaties. Migliazza (pp. 255-297) investigates the relations between the Administrative Tribunal of the I.L.O. and the International Court of Justice and the latter's new function of giving an advisory opinion with legally binding effect.

The two leading studies deal with general theoretical problems. Guggenheim (pp. 1-31) writes about *jus gentium*, *jus naturae* and *jus civile* and the international community at the time (12th and 13th centuries) of the "*divisio regnorum*," i.e., the beginning disintegration of the *Communitas Christiana* of the Middle Ages, a disintegration which led to the formation of the international community and of modern international law. Roberto Ago (pp. 33-96) writes on positive law and international law. Continuing ideas he expressed in a small earlier book, he wants to impress upon us the necessity to distinguish within the law actually in force the "positive" law in the original meaning of the term (namely, "*Jus positum*," owing its origin to a certain "source," created historically by certain authorities in a prescribed procedure) and the "spontaneous" law, which is also *law* actually in force, but not so created: This spontaneous law must be discovered by an inductive method, and to formulate it is the task of the science of law. Naturally, this distinction would be of particular importance in the law of nations, as the whole of general international law is customary and therefore for the author "spontaneous" law. The study of Ago, historically and critically, is highly interesting. But we cannot accept his findings; the reasons why we cannot do so, can, of course, not be developed in a book review.

JOSEF L. KUNZ

The U.N. and the China Dilemma. By David Brook. New York: Vantage Press, 1956. pp. 87. Bibliography. \$2.50.

The author of this little book is a graduate student at Columbia University. He presents a brief résumé of the Chinese revolution, concluding that "Communist China came into being as a result of internal factors. This is true despite the fact that she has received some help from Russia." (p. 23.) He then considers various criteria for recognition, including legitimacy and constitutionalism, fulfillment of international obligations, use as a political weapon, and effectiveness, with approval of the latter. Applying this criterion to the Chinese situation, he concludes that the Communist government should in principle be admitted to the United Nations, but "certain peculiar factors are present in this particular case." (p. 53.) These peculiar factors prove to be that Communist China's representation in the United Nations might adversely affect United States prestige and might weaken United States support for the United Nations.

A chapter is devoted to the handling of the Chinese problem in the United

Nations, with the conclusion that it would be better to decide questions of representation by a committee of jurists than by political debate.

The book throws no new light on the problem, but illustrates the reaction of what is probably a typical American mind after studying the problem.

QUINCY WRIGHT

Rechtsfragen der Internationalen Organisation. Festschrift für Hans Wehberg zu Seinem 70. Geburtstag. Herausgegeben von Walter Schätzel und Hans-Jürgen Schlochauer. Frankfurt am Main: Vittorio Klostermann, 1956. pp. 408. DM. 34.50.

This magnificent symposium in honor of the distinguished scholar and editor of *Die Friedens-Warte* and beloved friend and colleague of many members of our Society, Dr. Hans Wehberg, is a truly magnificent performance. It contains twenty-three contributions, in English, French, or German, from the pens of some of the most distinguished scholars in the field, although none from strictly American sources. It would be invidious to mention names. The contributions range widely, some, indeed, escaping from the field indicated by the title of the volume, although this is not, of course, fatal or even regrettable. Topics treated include, among others, the functions of international organization, certain historical examples thereof, certain territorial questions, sovereignty, and so on. The United Nations is not, to put it mildly, very prominent. There would be no point in trying to criticize or appraise the various items in this collection; it suffices to say that he who possesses this volume holds in his hands a veritable library of many of the specialized aspects of international organization.

PITMAN B. POTTER

Documents on the Use and Control of the Waters of Interstate and International Streams: Compacts, Treaties, Adjudications. Compiled and edited by T. Richard Witmer. Washington, D.C.: U. S. Government Printing Office, 1956. pp. viii, 760. \$2.00, paper.

Under a federal government the interstate compact is the counterpart of the international treaty. Since 1656 the English colonies, the Confederation and the Constitution have authorized these arrangements between the States, and there are in the Statutes at Large over 200 laws authorizing or consenting to them. Several include Canadian Provinces or Mexican States as potentially interested parties. Their subjects are of increasing variety and they tend to enlist the States of a whole region in co-operative efforts. The book under review seems to be the first compilation of interstate compacts on a given subject, and the foreword makes it clear that it is confined only to the consumptive use, pollution or flood problems of interstate waters, and omits consideration of compacts dealing with their navigation, recreational use, fisheries or boundaries.

As a working manual for the administrators of the compacts covered, the volume is complete. Historical notes on the 20 compacts in force throw

much light on riparian problems analogous to international ones, and 22 Supreme Court decisions, with twice as many citations of lower court decisions, deal with some points of international significance. Congress usually consents to what the States agree upon. Five unperfected compacts are printed, with their antecedent history; together they show that States of the United States sometimes find agreement on common matters as difficult as do states in the international sphere. The seven treaties with Canada and Mexico which are related to this group of compacts are usefully annotated with relation to them.

The Department of the Interior has brought this material together for its own practical uses in administering water rights. A perusal of the result impresses one with the desirability of compiling all of the interstate compacts in force in the United States, along with the relevant judicial decisions. They are a form of domestic treaty. The reviewer believes they would be useful in the international law field, if thus available, and is positive that the Congress needs to know better where it is going in this rapidly expanding field of co-operative activity.

DENYS P. MYERS

La Slovaquie dans le Drame de l'Europe (Histoire politique de 1918 à 1950). By Joseph A. Mikus. Paris: Les Iles d'Or, 1955. pp. iv, 475. Index. Fr. 1,350.

Slovakia is probably as little known to an average college-educated American as Albania or Laos; even Western Europeans have rather hazy ideas about that picturesque country in the Danubian region. Yet Slovakia is a part of Europe, her geographical location has a strategic value, and she has been frequently involved in the recent and dramatic history of Eastern Europe. Assuming that the United States, as a world Power, is directly or at least indirectly interested in the events of every part of our globe (the other world Power, the U.S.S.R., does not make a secret of having such a global interest, which includes Latin America), this book certainly represents a very useful contribution to our knowledge.

It supplies a rich documentation for the whole period of 1918-1950, which is divided by political events into three distinctly different sub-periods: the Czechoslovak Republic, terminated by the Nazi occupation of Prague, the separate Slovak Republic, and eventually the People's Republic with its Communist regime. The author wisely added a short historical introduction which is intended to familiarize the reader with the Slovak background and the long era of Hungarian rule. The chapters devoted to the Communist regime supply very valuable information which widens our understanding of the satellite system. When one compares the Communist policy in Slovakia to those pursued in other satellite countries, he comes to the conclusion that the basic pattern of Sovietization of Eastern Europe has been the same everywhere, but that it has been adjusted to the local conditions of each country. The phenomenon of those local adjustments should be borne in mind, because it proves the flexibility of Communist tactics even if this flexibility is limited by the existence of a general pattern.

Our Czech friends certainly will consider the author highly biased. The Hungarians will be inclined to agree with this judgment but for altogether different reasons which could not be shared by the Czechs. The author himself, as many of his countrymen, believes that both the Czechs and the Hungarians are unable to approach the Slovak problem with any objectivity. The crux of the problem is that it is practically impossible to have a detached view of any serious international controversy and surely hopeless to expect it from the parties concerned. This is as true of the Indians and the Pakistanis, the Israelis and the Arabs, the Slovaks, the Czechs and the Hungarians as of any other nation deeply involved in a controversial issue. The French author of the preface to this book, Professor Paul Lesourd, says with a hardly concealed smile: "A history of Slovakia, depending on whether it is written by a Slovak, a Hungarian or a Czech, is presented in a different, even opposite, way, but each is supported by documents and claims not only to be objective but to tell the Truth." A bystander, although he should have the intellectual humility to concede that he neither has the keys to the truth in such matters, should at least get acquainted with the views of all the parties concerned before formulating his own judgment, alas also fallible, but duly paying attention to all the relative truths in which the nations involved believe. Mr. Mikus thus renders a true service to Western readers by supplying a version of events which is the true version for those Slovaks (ninety percent according to him) who want an independent Slovak Republic.

However, as bitterly opposed as he is to a Czechoslovak Republic, he wisely ends his book by an appeal for a federated Central-Eastern Europe. The unfortunate history of 1918-1957 has proved that none of those several nations, numbering together about 100 million people, may exist for long as a truly independent state, placed as they are between the two dynamic nations: the Russians and the Germans. Yet there is no doubt that they want to be independent; the resistance to the Nazis and the recent events in Poland and Hungary prove it if any proof were needed. The question is how to be independent and yet to survive. Federation is the only answer, as the Western European nations, much stronger than the Eastern European, seem to have understood. Will the Eastern Europeans be wise enough to forget their past bitter quarrels and to subordinate everything to the problem of their common survival, if they are faced with an historical opportunity of free choice? This is now unfortunately an academic question, as the Soviet dominion weighs heavily on all of them and unites them but in a common serfdom imposed by Russia.

W. W. KULSKI

Glad Adventure. By Francis Bowes Sayre. New York: Macmillan Co., 1957. pp. xii, 356. Illustrations. Index. \$6.00.

Francis Sayre has given us here a charming and also a very informing book. In effect it is his autobiography from June, 1908, to the present. On the other hand, it contains so much information and interpretation of

conditions and events that it is much more than that. And it carries a careful index. Withal it is beautifully written, as would be expected.

The range of places and contacts and experiences treated is prodigious. They include, to name but a few, Labrador, Harvard, Washington, Siam, India, the Philippines, and Japan, in terms of places, and teaching, government advising, the Department of State, UNRRA, and the United Nations in terms of activities. There emerge in these contexts the most varied experiences and tests, trials, and tribulations imaginable, including "Corregidor—Escape by Submarine" (Chapter 16).

At the same time it must be emphasized that the author at many points has a message to deliver, or two messages, namely, international brotherhood and Christianity. The book should not be judged as a technical historical treatise, although, as already indicated, it contains a great deal of meaty material, and here and there the historian will find bits of information contributing significantly to our knowledge of certain events and passages in recent history, particularly in Chapters 7 (Siam), 12 (Trade Agreements), 14 (The Philippines), and 19 (United Nations and Trusteeship Council). It will take some time to exhaust the contributions of the author on this score.

Mr. Sayre's idealistic and sentimental and religious leanings are set forth in outspoken and emphatic fashion. In all that he has done he has worked, to quote the publishers, "for God and humanity." He is doing the same in these papers.

PITMAN B. POTTER

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OFFICIAL DOCUMENTS

EGYPT

PRESIDENTIAL DECREE ABROGATING 1954 AGREEMENT WITH THE UNITED KINGDOM *January 1, 1957*

[*Translation*] ¹

The President of the Republic,

After perusal of the Agreement concluded between the Government of the Republic of Egypt and the Government of the United Kingdom of Great Britain and Northern Ireland and signed in Cairo on 19th October 1954;

After perusal of the United Nations General Assembly's resolutions of 2nd, 4th, 5th and 7th November, 1956 concerning the Anglo-French-Israeli attack on Egyptian territory; and with reference to the ruling of the Council of State, and since that attack is regarded as a violation of the said Agreement on the part of Britain, and on the basis of the reports submitted by the Minister of Foreign Affairs;

Has decreed:

ARTICLE I: It is established that the Government of the United Kingdom of Great Britain and Northern Ireland, by plotting and carrying out the attack on Egyptian territory with the participation of French and Israeli forces and by attempting to invade the Suez Canal Zone as of 31st October, 1956, has acted on the premise that the Agreement which it had concluded with the Government of the Republic of Egypt on 19 October, 1954, was non-existent. It is, therefore, established that the Agreement has been terminated by the said attack and with effect from the date on which it took place.

ARTICLE II: In consequence of the above, the Law No. 637 of 1954 endorsing the said Agreement, its annexes and the exchange of letters and agreed minutes attached to it is hereby abrogated. The cabinet decision of 24th November, 1954 to promulgate the said Agreement and its annexes is also rescinded.

ARTICLE III: The Ministers, insofar as each is concerned, are charged with the execution of this DECREE.

Signed: GAMAL ABDEL-NASSER HUSSAIN

1st January 1957

NOTE: Abdal Qadir Hatim, Egyptian Director of Information, made a statement on January 1, 1957, wherein he said, *inter alia*, that:

¹ Translation from an official unclassified source, submitted by a member of the Society in the Near East.

The Agreement concluded between Egypt and Britain on October 19, 1954, is considered to have been terminated at 6 a.m. on October 31, 1956, the date on which British aircraft raided Egypt.

The agreement had been signed for the purpose of establishing friendly relations between the two countries. It stipulated in its preamble that the Egyptian and British Governments had concluded this agreement for the purpose of establishing relations between Egypt and Britain on a new basis of mutual understanding and close friendship. But the British Government invalidated this agreement when it launched the attack on Egypt. . . .

As it is the common practice that special agreements concluded between states for the purpose of consolidating friendly relations between them should become invalid the moment any of the parties concerned declares war or commits acts of aggression against another party, the act of aggression perpetrated by Britain against Egypt on October 31, 1956 terminates the agreement concluded between them on October 19, 1954.

DECLARATION ON THE SUEZ CANAL¹

April 24, 1957

In elaboration of the principles set forth in their memorandum dated March 18, 1957, the Government of the Republic of Egypt, in accord with the Constantinople Convention of 1888 and the Charter of the United Nations, make hereby the following Declaration on the Suez Canal and the arrangements for its operation.

1. Reaffirmation of Convention

It remains the unaltered policy and firm purpose of the Government of Egypt to respect the terms and the spirit of the Constantinople Convention of 1888 and the rights and obligations arising therefrom. The Government of Egypt will continue to respect, observe and implement them.

2. Observance of the Convention and of the Charter of the United Nations

While reaffirming their determination to respect the terms and the spirit of the Constantinople Convention of 1888 and to abide by the Charter and the principles and purposes of the United Nations, the Government of Egypt are confident that the other signatories of the said Convention and all others concerned will be guided by the same resolve.

3. Freedom of navigation, tolls, and development of the Canal

The Government of Egypt are more particularly determined:

(a) To afford and maintain free and uninterrupted navigation for all nations within the limits of and in accordance with the provisions of the Constantinople Convention of 1888;

¹ Reprinted from the United Nations Review, Vol. 3, No. 12 (June, 1957), p. 15. The Declaration was transmitted to the Secretary General of the United Nations by letter of April 24, 1957, from the Foreign Minister of Egypt requesting that the Declaration be registered with the United Nations as an international instrument.

(b) That tolls shall continue to be levied in accordance with the last agreement, concluded on April 28, 1936, between the Government of Egypt and the Suez Canal Maritime Company, and that any increase in the current rate of tolls within any twelve months, if it takes place, shall be limited to 1 per cent, any increase beyond that level to be the result of negotiations, and failing agreement, be settled by arbitration according to the procedure set forth in paragraph 7 (b) ;

(c) That the Canal is maintained and developed in accordance with the progressive requirements of modern navigation and that such maintenance and development shall include the 8th and 9th Programs of the Suez Canal Maritime Company and such improvements to them as are considered necessary.

4. Operation and management

The Canal will be operated and managed by the autonomous Suez Canal Authority established by the Government of Egypt on July 26, 1956. The Government of Egypt are looking forward with confidence to continued co-operation with the nations of the world in advancing the usefulness of the Canal. To that end the Government of Egypt would welcome and encourage co-operation between the Suez Canal Authority and representatives of shipping and trade.

5. Financial arrangements

(a) Tolls shall be payable in advance to the account of the Suez Canal Authority at any bank as may be authorized by it. In pursuance of this, the Suez Canal Authority has authorized the National Bank of Egypt and is negotiating with the Bank of International Settlement to accept on its behalf payment of the Canal tolls.

(b) The Suez Canal Authority shall pay to the Government of Egypt 5 per cent of all the gross receipts as royalty.

(c) The Suez Canal Authority will establish a Suez Canal Capital and Development Fund into which shall be paid 25 per cent of all gross receipts. This Fund will assure that there shall be available to the Suez Canal Authority adequate resources to meet the needs of development and capital expenditure for the fulfillment of the responsibilities they have assumed and are fully determined to discharge.

6. Canal Code

The regulations governing the Canal, including the details of its operation, are embodied in the Canal Code which is the law of the Canal. Due notice will be given of any alteration in the Code, and any such alteration, if it affects the principles and commitments in this Declaration and is challenged or complained against for that reason, shall be dealt with in accordance with the procedure set forth in paragraph (7) (b).

7. Discrimination and complaints relating to the Canal Code

(a) In pursuance of the principles laid down in the Constantinople Convention of 1888, the Suez Canal Authority, by the terms of its Charter,

can in no case grant any vessel, company or other party any advantage or favour not accorded to other vessels, companies or parties on the same conditions.

(b) Complaints of discrimination or violation of the Canal Code shall be sought to be resolved by the complaining party by reference to the Suez Canal Authority. In the event that such a reference does not resolve the complaint, the matter may be referred, at the option of the complaining party or the Authority, to an arbitration tribunal composed of one nominee of the complaining party, one of the Authority and a third to be chosen by both. In case of disagreement, such third member will be chosen by the President of the International Court of Justice upon the application of either party.

(c) The decisions of the arbitration tribunal shall be made by a majority of its members. The decisions shall be binding upon the parties when they are rendered and they must be carried out in good faith.

(d) The Government of Egypt will study further appropriate arrangements that could be made for fact-finding, consultation and arbitration on complaints relating to the Canal Code.

8. *Compensation and claims*

The question of compensation and claims in connection with the nationalization of the Suez Canal Maritime Company shall, unless agreed between the parties concerned, be referred to arbitration in accordance with the established international practice.

9. *Disputes, disagreements or differences arising out of the Convention and this Declaration*

(a) Disputes or disagreements arising in respect of the Constantinople Convention of 1888 or this Declaration shall be settled in accordance with the Charter of the United Nations.

(b) Differences arising between the parties to the said Convention in respect of the interpretation or the applicability of its provisions, if not otherwise resolved, will be referred to the International Court of Justice. The Government of Egypt would take the necessary steps in order to accept the compulsory jurisdiction of the International Court of Justice in conformity with the provisions of Article 36 of its Statute.

10. *Status of this Declaration*

The Government of Egypt make this Declaration, which re-affirms and is in full accord with the terms and spirit of the Constantinople Convention of 1888, as an expression of their desire and determination to enable the Suez Canal to be an efficient and adequate waterway linking the nations of the world and serving the cause of peace and prosperity.

This Declaration, with the obligations therein, constitutes an international instrument and will be deposited and registered with the Secretariat of the United Nations.

FRANCE-MOROCCO

JOINT DECLARATION¹

Signed at Paris, March 2, 1956

The Government of the French Republic and His Majesty Mohammed V, Sultan of Morocco, hereby solemnly state their determination to make fully operative the Declaration of La Celle-Saint-Cloud of November 6, 1955.

They note that, in view of Morocco's advance along the road to progress, the Treaty of Fez of March 30, 1912 is no longer consistent with the requirements of modern life and can no longer govern Franco-Moroccan relations.

Consequently, the Government of the French Republic hereby solemnly confirms its recognition of the independence of Morocco—which implies in particular the right to a diplomacy and an army—as well as its determination to respect, and to see to it that others respect, the integrity of Moroccan territory, as guaranteed by international treaties.

The Government of the French Republic and His Majesty Mohammed V, Sultan of Morocco, hereby declare that the purpose of the negotiations which have just opened in Paris between Morocco and France, as equal and sovereign States, is to conclude new agreements which will define the interdependence of the two countries in the fields where they have common interests, will thus organize their cooperation on a basis of liberty and equality, especially in matters of defense, foreign relations, economy and culture, and will guarantee the rights and liberties of French persons settled in Morocco and of Moroccans settled in France, with due respect for the sovereignty of the two States.

The Government of the French Republic and His Majesty Mohammed V, Sultan of Morocco, hereby agree that, pending the entry into force of these agreements, the new relations between France and Morocco shall be founded on the provisions of the annexed Protocol to the present Declaration.

Done at Paris, in two original copies, on March 2, 1956.

(Signed) CHRISTIAN PINEAU, EMBAREK BEKKAI

ANNEXED PROTOCOL

I.—The legislative power shall be exercised as a sovereign right by His Majesty the Sultan. The representative of France shall be advised of draft dahirs and decrees: during the transitional period, he shall have the right to submit observations on these texts when they concern the interests of France, French nationals or foreigners.

II.—His Majesty Mohammed V, Sultan of Morocco, shall have at his disposal a national army. France will render assistance to Morocco in the

¹ Reprinted from Moroccan Affairs, No. 12, March, 1956 (Embassy of France, Press and Information Service).

constitution of that army. The present status of the French army in Morocco shall remain unchanged, during the transitional period.

III.—Those administrative powers which up until now have been reserved shall be transferred in a manner to be determined by common agreement.

The Moroccan Government shall be represented, with a deliberative voice, on the Committee of the Franc Area, the central organ determining the monetary policy of the Franc Area as a whole.

Furthermore, the guarantees enjoyed by French civil servants and Government employees serving in Morocco shall be continued.

IV.—The representative of the French Republic in Morocco shall have the title of High Commissioner of France.

Done at Paris, in two original copies, on March 2, 1956.

(Signed) CHRISTIAN PINEAU, EMBAREK BEKKAI

EXCHANGE OF LETTERS BETWEEN H. E. EMBAREK BEKKAI, PRESIDENT OF
THE MOROCCAN GOVERNMENT, CHAIRMAN OF THE MOROCCAN
DELEGATION, AND M. CHRISTIAN PINEAU, MINISTER OF
FOREIGN AFFAIRS, CHAIRMAN OF THE FRENCH
DELEGATION (DATED MARCH 2, 1956)

(A) CONCERNING DIPLOMACY

Letter from Embarek Bekkai to Christian Pineau

Mr. Chairman, Following the Joint Declaration and the Protocol dated today, I have the honor of informing you that the Moroccan Government requests the French Government to continue to assume responsibility for the conduct of Morocco's foreign relations as well as for the representation and protection of Moroccan nationals and interests abroad, pending agreement by the two Governments, at the request of the Moroccan Government, on new provisions applying to the transitional period.

Please accept, Mr. Chairman, the assurance of my highest consideration.

Letter from Christian Pineau to Embarek Bekkai

Mr. Chairman, By a letter dated today, you have been pleased to bring the following to my attention:

"Following the Joint Declaration and the Protocol dated today, I have the honor of informing you that the Moroccan Government requests the French Government to continue to assume responsibility for the conduct of Morocco's foreign relations as well as for the representation and protection of Moroccan nationals and interests abroad, pending agreement by the two Governments, at the request of the Moroccan Government, on new provisions applying to the transitional period."

I have the honor of confirming to you that the French Government accedes to this request.

Please accept, Mr. Chairman, the assurance of my highest consideration.

(B) CONCERNING THE IMPLEMENTATION OF ARTICLE II OF THE PROTOCOL

Letter from Christian Pineau to Embarek Bekkai

Mr. Chairman, I have the honor of proposing to you that a Commission consisting of representatives of the Moroccan Government and of the French Government should meet on March 12, 1956, either in Rabat or in Paris, in order to ensure the implementation of Article II of the Protocol of March 2, 1956.

Please accept, Mr. Chairman, the assurance of my highest consideration.

Letter from Embarek Bekkai to Christian Pineau

Mr. Chairman, By a letter dated today, you have been pleased to bring the following to my attention:

"I have the honor of proposing to you that a Commission consisting of representatives of the Moroccan Government and of the French Government should meet on March 12, 1956, either in Rabat or in Paris, in order to ensure the implementation of Article II of the Protocol of March 2, 1956."

I have the honor of confirming to you that the Moroccan Government accepts this proposal.

Please accept, Mr. Chairman, the assurance of my highest consideration.

(C) CONCERNING MONETARY AND FINANCIAL MATTERS

Letter from Embarek Bekkai to Christian Pineau

Mr. Chairman, I wish to confirm to you that the Moroccan Government agrees, in the monetary and financial fields, not to make any change in the present system, pending a definition of the new modalities of cooperation between our two countries in those fields, in accordance with the Joint Declaration and the Protocol dated today.

Please accept, Mr. Chairman, the assurance of my highest consideration.

Letter from Christian Pineau to Embarek Bekkai

Mr. Chairman, By a letter dated today, you have been pleased to bring the following to my attention:

"I wish to confirm to you that the Moroccan Government agrees, in the monetary and financial fields, not to make any change in the present system, pending a definition of the new modalities of cooperation between our two countries in those fields, in accordance with the Joint Declaration and the Protocol dated today."

I have the honor of confirming to you that the French Government agrees to the preceding provisions.

Please accept, Mr. Chairman, the assurance of my highest consideration.

(D) CONCERNING THE TRANSFER OF POWERS

Letter from Embarek Bekkai to Christian Pineau

Mr. Chairman, In pursuance of Article III of the Protocol of March 2, 1956, I have the honor of proposing to you that a Commission consisting of French and Moroccan representatives should meet on March 10, 1956, in Rabat, to consider the question of the transfer of those administrative powers which up until now have been reserved, with the exception of monetary, financial, military and diplomatic problems, to be dealt with either in Rabat or in Paris.

Please accept, Mr. Chairman, the assurance of my highest consideration.

Letter from Christian Pineau to Embarek Bekkai

Mr. Chairman, By a letter dated today, you have been pleased to communicate to me the following:

"In pursuance of Article III of the Protocol of March 2, 1956, I have the honor of proposing to you that a Commission consisting of French and Moroccan representatives should meet on March 10, 1956, in Rabat, to consider the question of the transfer of those administrative powers which up until now have been reserved, with the exception of monetary, financial, military and diplomatic problems, to be dealt with either in Rabat or in Paris."

I have the honor of informing you that the French Government agrees to the preceding provisions.

Please accept, Mr. Chairman, the assurance of my highest consideration.

COMMUNIQUE ISSUED BY M. CHRISTIAN PINEAU, MINISTER
OF FOREIGN AFFAIRS

The French Government intends, in accordance with French constitutional rules, to submit, in due course, to the Parliament for ratification the whole series of agreements resulting from the present Declaration and of the conventions which will result from the current conversations pertaining to the relations of interdependence between Morocco and France and to the guarantee of the rights and interests of the French residents in Morocco.

DIPLOMATIC ACCORD¹

Signed at Paris, May 28, 1956

The President of the French Republic and His Majesty Mohammed V. Sultan of Morocco,

Desirous to lay down the principles by which the two states intend to organize, in full equality and with due respect for their independence, the

¹ Reprinted from Moroccan Affairs, No. 13, June, 1956 (Embassy of France, Press and Information Service).

ties of friendship and cooperation which will serve the mutual interests of France and Morocco,

Anxious to define the modalities of the interdependence freely established between the two countries in the field of external relations, in pursuance of the Declaration of March 2, 1956, and determined thus to maintain and to strengthen the solidarity which unites them,

Have appointed as their Plenipotentiaries,

The President of the French Republic: His Excellency Christian Pineau, Minister of Foreign Affairs of the Government of the French Republic;

His Majesty Mohammed V, Sultan of Morocco: His Excellency Ahmed Balafrej, Minister of Foreign Affairs of the Government of His Majesty the Sultan;

Who, having exchanged their full powers, found to be in good and due form,

Have agreed on the following provisions:

Article First—The two High Contracting Parties, resolved to maintain between them relations of lasting friendship, mutual aid and assistance, will keep each other informed of all questions concerning their common interest and will hold regular consultations on problems of general interest.

Article 2—If the High [Contracting] Parties are in any way threatened in their common interests, they will immediately consult each other in order to meet this threat if the situation so requires.

Article 3—In order to ensure united action in the field of foreign policy, the Ministers of Foreign Affairs of the two Governments shall meet periodically, or at the request of one of the Parties.

Article 4—The High Contracting Parties hereby undertake, as far as each is concerned, not to adhere to any policy which, after joint examination, they have recognized as incompatible with the interests of one of them.

Article 5—Each of the Parties hereby undertakes not to conclude any international conventions which would render ineffective the rights it has recognized, by agreement, as belonging to the other Party.

Article 6—None of the present provisions can be interpreted as infringing upon the obligations which result either from the United Nations Charter, or from commitments, treaties or conventions in force between one of the High Contracting Parties and a third power.

None of the present provisions must, furthermore, be interpreted as limiting the power of one of the High Contracting Parties to negotiate and conclude treaties, conventions or other international acts.

Article 7—The High Contracting Parties hereby agree that any disagreement as to the application or interpretation of the present treaty which they have not succeeded in solving through direct negotiations between themselves may be taken, on the proposal of one of the parties, before the International Court of Justice in The Hague.

Article 8—France will second Morocco's candidacy to international organizations in which it is not represented.

The delegations of the two Governments in the international organizations shall keep each other mutually informed of their activities, shall consult with each other and discuss their action along the lines of the present accord.

Article 9—The French Republic is disposed, if the Moroccan Government so requests, to ensure the representation and protection of Moroccan subjects and interests, in the countries where Morocco has not decided to send a permanent diplomatic mission. In this case, French diplomatic and consular agents shall act in accordance with the directives of the Moroccan Government.

Article 10—The diplomatic representatives whom each of the High Contracting Parties shall accredit to the other, shall respectively bear the titles of Ambassador Extraordinary and Special Envoy of the French Republic to His Majesty the Sultan, and Ambassador Extraordinary and Special Envoy of His Majesty the Sultan to the French Republic.

Article 11—Morocco hereby assumes the obligations resulting from international treaties concluded by France in the name of Morocco, as well as those which result from the international acts concerning Morocco, on which it has made no observations.

In witness whereof, the Plenipotentiaries have signed the present accord and thereto affixed their seals.

Done at Rabat, May 20, 1956, in two original copies.

Signed at Paris, May 28, 1956

For France, C. PINEAU

For Morocco, A. BALAFREJ

EXCHANGE OF LETTERS CONCERNING THE DIPLOMATIC REPRESENTATION
OF FRANCE IN RABAT, AND OF MOROCCO IN PARIS

Letter from Christian Pineau to Ahmed Balafrej

Mr. Minister,

The Moroccan Government has been pleased to inform the French Government, during its visit to Paris last May 7, then in the course of the talks held by M. Savary in Rabat, that the Sovereign and his Government had decided that the Ambassador Extraordinary and Special Envoy of the French Republic to His Majesty the Sultan would, in this capacity, assume the role of Dean of the Diplomatic Corps in Rabat. I should like to express to you the thanks of the Government of the Republic and beg you to convey them to His Majesty the Sultan and to his Government.

I am also happy to take this opportunity to confirm to you that the French Government, taking into consideration Article 10 of the Diplomatic Accord between France and Morocco, will grant to the Ambassador Extra-

ordinary and Special Envoy from His Majesty the Sultan to the French Republic a privileged position among accredited diplomatic representatives in Paris. In taking this decision, it was the intention of the French Government to demonstrate the special relationship existing between our two peoples. Together with the decision of the Moroccan Government, it constitutes evidence of the common desire for friendship and cooperation which characterizes relations between Morocco and France.

Please accept, Mr. Minister, the assurance of my highest consideration.

Letter from Ahmed Balafrej to Christian Pineau

Mr. Minister,

I have the honor of confirming to you that the Government of His Majesty the Sultan has decided to reserve for the Ambassador Extraordinary and Special Envoy of the French Republic to His Majesty the Sultan, the role of Dean of the Diplomatic Corps in Rabat, in order to stress the ties of friendship and cooperation characterizing the relations between our two states.

The Moroccan Government hereby expresses its thanks to the Government of the French Republic, which is pleased to grant to the Ambassador Extraordinary and Special Envoy of His Majesty the Sultan to the French Republic a privileged position among accredited diplomatic representatives in Paris.

Please accept, Mr. Minister, the assurance of my highest consideration.

EXCHANGE OF LETTERS CONCERNING THE FRANCO-AMERICAN AGREEMENT OF
DECEMBER 22, 1950 ON THE AMERICAN BASES IN MOROCCO

Letter from Ahmed Balafrej to Christian Pineau

Mr. Minister,

I have the honor of informing you that the Moroccan Government entirely reserves its position as regards the Franco-American agreement of December 22, 1950.

Please accept, Mr. Minister, the assurance of my highest consideration.

Letter from Christian Pineau to Ahmed Balafrej

Mr. Minister,

I have the honor of acknowledging receipt of your letter dated May 20, 1956 and worded as follows:

“I have the honor of informing you that the Moroccan Government entirely reserves its position as regards the Franco-American agreement of December 22, 1950.”

The French Government has taken cognizance of your reservations on the Franco-American agreement of December 22, 1950. I hereby confirm to you, in this respect, the fact that this agreement does not come under

the same head as the acts and treaties referred to in Article 11 of the Diplomatic Accord between France and Morocco dated today.

Please accept, Mr. Minister, the assurance of my highest consideration.

FRANCE-TUNISIA

PROTOCOL OF AGREEMENT ¹

Signed at Paris, March 20, 1956

On June 3, 1955, following the free negotiations which had taken place between their delegations, the French Government and the Tunisian Government agreed to grant Tunisia the full exercise of internal sovereignty. They thus demonstrated their determination to enable the Tunisian people to realize their full potentialities and to assume control of their destiny by gradual stages.

The two Governments recognize that the harmonious and peaceful development of Franco-Tunisian relations meets the requirements of the modern world. They note with satisfaction that this evolution makes possible Tunisia's accession to full sovereignty without suffering for the people and without harm to the State. They affirm their conviction that, in basing their relations on mutual and complete respect for their sovereignties, with independence and equality for both States, France and Tunisia are strengthening the solidarity which unites them for the greatest good of both countries.

Following the declaration of investiture of the French President of the Council and the answer of His Highness the Bey, which reaffirmed their common determination to promote their relations in the same spirit of peace and friendship, the two Governments opened negotiations in Paris on February 27.

In consequence whereof:

France solemnly recognizes the independence of Tunisia.

Whence it follows:

That the treaty concluded between France and Tunisia on May 12, 1881 can no longer govern Franco-Tunisian relations;

That those provisions of the Conventions of June 3, 1955 ² which would be contradictory to the new status of Tunisia as an independent and sovereign State shall be modified or abrogated.

Whence it also follows:

That Tunisia will have the exercise of its responsibilities in matters of foreign affairs, security and defense;

That a Tunisian national army will be constituted.

With due respect for their sovereignties, France and Tunisia agree to define or to perfect the modalities of a freely effected interdependence be-

¹ Reprinted from Tunisian Affairs, No. 12, March, 1956 (Embassy of France, Press and Information Service).

² See Tunisian Affairs, No. 10, for texts of Franco-Tunisian Conventions of June 3, 1955.

tween the two countries by organizing their cooperation in the domains in which they have common interests, particularly in matters of defense and foreign relations.

The agreements between France and Tunisia will establish the modalities of the assistance that France will give Tunisia in setting up a Tunisian national army.

Negotiations will be resumed on April 16, 1956 in order to draw up, as quickly as possible and in accordance with the principles laid down in the present Protocol, the instruments necessary for their implementation.

Done at Paris in two original copies, March 20, 1956.

For France: (signed) CHRISTIAN PINEAU

For Tunisia: (signed) TAHAR BEN AMMAR

DIPLOMATIC ACCORD ³

Signed at Tunis, June 15, 1956

The President of the French Republic and His Highness the Bey of Tunis have resolved to conclude an accord on the questions of diplomatic representation.

They have appointed, to this end, as their Plenipotentiaries,

The President of the French Republic:

Mr. Roger Seydoux Fornier de Clausonne, High Commissioner of France in Tunisia,

His Highness the Bey of Tunis:

Mr. Habib Bourguiba, Prime Minister, President of the Council,

Who, having exchanged their full powers, found to be in good and due form,

Have agreed on the following provisions:

Article First—France will be represented in Tunis, and Tunisia in Paris, by an Ambassador. The diplomatic representatives of each of the two countries shall bear, respectively, the titles of Ambassador Extraordinary and Special Envoy of the French Republic to His Highness the Bey, and Ambassador Extraordinary and Special Envoy of His Highness the Bey to the French Republic.

Article Two—In the countries where Tunisia shall not have decided to send a permanent diplomatic mission, the French Republic is disposed, if the Tunisian Government so requests, to ensure the representation and protection of Tunisian subjects and interests. In this case, French diplomatic and consular agents shall act in accordance with the directives of the Tunisian Government.

Article Three—France will second Tunisia's candidacy to international organizations in which the latter is not represented.

³ Reprinted from *Tunisian Affairs*, No. 13, June, 1956 (Embassy of France, Press and Information Service).

Article Four—Pending conclusion of the treaty which shall define the modalities of their cooperation in the field of external affairs, the two Governments, acting in the spirit of friendship and solidarity which characterizes their relations, will keep each other informed and will consult each other on all questions of common interest with which they will be faced in that domain.

In witness whereof, the Plenipotentiaries have signed the present accord and thereto affixed their seals.

Done at Tunis, in two original copies, on June 15, 1956.

EXCHANGE OF LETTERS CONCERNING THE FRANCO-TUNISIAN NEGOTIATIONS
TO OPEN IN PARIS ON JUNE 26, 1956

Letter Dated June 15, 1956 from Habib Bourguiba to Roger Seydoux

Mr. High Commissioner,

By virtue of the accord just concluded between our two Governments within the terms of the Protocol of March 20, 1956, the diplomatic representatives of each of our two countries shall bear, respectively, the titles of "Ambassador Extraordinary and Special Envoy of the French Republic to His Highness the Bey," and "Ambassador Extraordinary and Special Envoy of His Highness the Bey to the French Republic."

The Tunisian Government congratulates itself on the spirit in which this accord was reached, sanctioning the mutual determination of our two countries to see their relations based on durable foundations, with mutual and complete respect for the sovereignty, independence and equality of both states.

This step having been taken, the Tunisian Government is disposed to continue, at the best possible time, the negotiations between our two countries in order to promote our relations in the same spirit of peace and friendship. I propose, to this end, the date of Tuesday, June 26, 1956.

In accordance with the Protocol of March 20, 1956, our two Governments are determined to conclude, during the course of these negotiations, a treaty of friendship and alliance. This treaty, based on a just and free weighing of their interests by both countries, will determine the modalities of their close cooperation in matters of defense and foreign affairs.

Please accept, Mr. High Commissioner, assurances of my highest consideration.

Letter Dated June 15, 1956 from Roger Seydoux to Habib Bourguiba

Mr. President,

You were kind enough to send me, under today's date, the following letter:

"By virtue of the accord just concluded between our two Governments within the terms of the Protocol of March 20, 1956, the diplomatic representatives of each of our two countries shall bear, respectively, the titles of 'Ambassador Extraordinary and Special Envoy

of the French Republic to His Highness the Bey,' and 'Ambassador Extraordinary and Special Envoy of His Highness the Bey to the French Republic.'

"The Tunisian Government congratulates itself on the spirit in which this accord was reached, sanctioning the mutual determination of our two countries to see their relations based on durable foundations, with mutual and complete respect for the sovereignty, independence and equality of both states.

"This step having been taken, the Tunisian Government is disposed to continue, at the best possible time, the negotiations between our two countries in order to promote our relations in the same spirit of peace and friendship. I propose, to this end, the date of Tuesday, June 26, 1956.

"In accordance with the Protocol of March 20, 1956, our two Governments are determined to conclude, during the course of these negotiations, a treaty of friendship and alliance. This treaty, based on a just and free weighing of their interests by both countries, will determine the modalities of their close cooperation in matters of defense and foreign affairs."

In thanking you for this communication, I have the honor to confirm to you the agreement of the French Government on the preceding proposals. Please accept, Mr. President, assurances of my highest consideration.

EXCHANGE OF LETTERS CONCERNING THE PRIVILEGED POSITION OF THE
AMBASSADOR OF FRANCE IN TUNIS AND OF THE AMBASSADOR
OF TUNISIA IN PARIS

Letter Dated June 15, 1956 from Roger Seydoux to Habib Bourguiba

Mr. President,

I have the honor of confirming to you that the French Government has decided to reserve for the Ambassador Extraordinary and Special Envoy of His Highness the Bey to the French Republic, a privileged position among the accredited diplomatic representatives in Paris, and this, in order to stress the ties of friendship and of cooperation which characterize the relations between our two states.

The French Government hereby expresses its thanks to the Tunisian Government which is pleased to reserve for the Ambassador Extraordinary and Special Envoy of the French Republic to His Highness the Bey, the role of Dean of the Diplomatic Corps in Tunis.

Please accept, Mr. President, assurances of my highest consideration.

Letter Dated June 16, 1956 from Habib Bourguiba to Roger Seydoux

Mr. High Commissioner,

I have the honor of confirming to you that the Tunisian Government has decided to reserve for the Ambassador Extraordinary and Special

Envoy of the French Republic to His Highness the Bey, the role of Dean of the Diplomatic Corps in Tunis, and this, in order to stress the ties of friendship and cooperation which characterize the relations between our two states.

The Tunisian Government hereby expresses its thanks to the Government of the French Republic which is pleased to grant to the Ambassador Extraordinary and Special Envoy of His Highness the Bey to the French Republic, a privileged position among the accredited diplomatic representatives in Paris.

Please accept, Mr. High Commissioner, assurances of my highest consideration.

UNITED KINGDOM-UNION OF SOVIET SOCIALIST REPUBLICS

FISHERIES AGREEMENT ¹

TOGETHER WITH MINUTE TO ARTICLE 1 OF THE AGREEMENT AND EXCHANGE
OF NOTES ON TERRITORIAL WATERS

Signed at Moscow, May 25, 1956; in force March 12, 1957

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics have decided to conclude the present Agreement and have appointed their Representatives:

The Government of the United Kingdom:

Sir William Hayter, Her Majesty's Ambassador Extraordinary and Plenipotentiary at Moscow,

The Government of the Union of Soviet Socialist Republics:

Vasili Vasilievich Kuznetsov, Deputy Minister of Foreign Affairs of the Union of Soviet Socialist Republics,

Who, having exchanged full powers which have been found to be in good order and due form, have agreed on the following:

ARTICLE 1

The Government of the Union of Soviet Socialist Republics agree to concede the right to fishing boats registered at the ports of the United Kingdom to fish in the waters of the Barents Sea along the coast of the Kola Peninsula between the meridians thirty-six degrees and thirty-seven degrees fifty minutes of East longitude, along the mainland to the East of the point of Cape Kanin between the meridians forty-three degrees seventeen minutes and fifty-one degrees of East longitude and also along the coast of Kolguev Island, up to a distance of three sea miles from low water mark both on the

¹ Treaty Series, No. 36 (1957), Cmnd. 148.

mainland and on the islands; the right is also conceded to these boats to sail freely and to anchor in these waters.

ARTICLE 2

United Kingdom fishing boats entering Soviet ports and sheltered waters in extraordinary circumstances will be governed by the regulations laid down by the competent Soviet authorities.

ARTICLE 3

The present Agreement is subject to ratification. The exchange of the instruments of ratification shall take place as soon as possible in London.

The Agreement has been concluded for a period of five years and shall enter into force from the date of the exchange of the instruments of ratification.

If neither of the parties has given notice of denunciation not later than one year before the termination of the above period in which the Agreement is in force, the Agreement will remain in force for a further five years and thus each time it will be considered to have been extended for a further five years unless one of the parties denounces it not later than one year before the termination of the current five-year period in which it is in force.

Done at Moscow on the 25th of May, 1956, in duplicate, both in the English and Russian languages, and both texts being equally authoritative.

W. G. HAYTER,	V. KUZNETSOV,
For the Government of the United	For the Government of the Union
Kingdom of Great Britain and	of Soviet Socialist Republics.
Northern Ireland.	

MINUTE

TO ARTICLE 1 OF THE AGREEMENT BETWEEN THE GOVERNMENT OF THE
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
AND THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST
REPUBLICS ON FISHERIES OF MAY 25, 1956

The permission given by the Government of the Union of Soviet Socialist Republics to fishing vessels registered at the United Kingdom ports to engage in fishing, to navigate freely and anchor in the waters indicated in Article 1 of the Agreement shall not be considered to concede to such fishing vessels the right to engage in fishing, to navigate and anchor in such forbidden zones as may be established by the competent Soviet authorities inside the limits of the waters coming within the scope of the Agreement.

For the Government of the United	For the Government of the Union
Kingdom of Great Britain and	of Soviet Socialist Republics:
Northern Ireland:	

W. G. HAYTER.

V. KUZNETSOV.

EXCHANGE OF NOTES ON TERRITORIAL WATERS

No. 1

*Her Majesty's Ambassador at Moscow to the Soviet Union Deputy
Minister of Foreign Affairs*

British Embassy,

Mr. Deputy Minister,

Moscow, May 25, 1956

I have the honour to refer to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, signed this day at Moscow, for regulating the fishing activities of fishing boats registered in the ports of the United Kingdom in the waters contiguous to the Northern coasts of the Union of Soviet Socialist Republics and the Islands dependent thereon, and to inform your Excellency that it is the understanding of the Government of the United Kingdom that nothing in this Agreement shall be deemed to prejudice the claims or views of either Contracting Government in regard to the limits of territorial waters.

I have the honour to suggest that the present Note and your Excellency's reply thereto shall be regarded as an official expression of the points of view of the two Governments on this matter.

W. G. HAYTER.

No. 2

*The Soviet Union Deputy Minister of Foreign Affairs to Her Majesty's
Ambassador at Moscow*

(Translation)

Mr. Ambassador,

Moscow, May 25, 1956.

Taking into consideration the view of the British Government, expressed in your Excellency's Note of to-day's date, that no provisions contained in the Agreement on Fisheries signed to-day in Moscow between the Government of the Union of Soviet Socialist Republics and the Government of the United Kingdom of Great Britain and Northern Ireland shall be deemed to prejudice the claims or views of the Contracting Parties concerning the limits of territorial waters, I have the honour to remind you that the width of the Soviet Union's territorial waters and the regulations governing them were defined in the Statute concerning the Security of the State Frontiers of the Union of Soviet Socialist Republics of June 15, 1927.

With this I have the honour to confirm that your Excellency's Note and the present answer shall be regarded as an official expression of the points of view of the two Governments on this question.

V. KUZNETSOV.

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POSITIVE LAW AND INTERNATIONAL LAW *

BY ROBERTO AGO

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1. One of the most representative authors of modern analytical philosophy, T. D. Weldon,¹ has pointed out recently how he and his English and American colleagues have come to realize that many of the problems which their predecessors found insuperable arise not from something mysterious or inexplicable in the world around them, but from the peculiarities of the language with which we try to describe the world itself. This Oxford philosopher remarks that many errors in political doctrine and in various branches of philosophy are caused by "carelessness over the implications of language." This carelessness, he goes on to say, is often due to the mistaken idea that words, and especially the words that normally recur in discussions on matters of political doctrine, have an intrinsic and essential meaning of their own, more or less in the same way as children have parents. But in fact words only have a use: to know their meaning is to know how to use them correctly "in such a way as to be generally intelligible, in ordinary and technical discourse.")

This obvious and time-honored truth² may be usefully repeated in the field of law as well as in that of politics or philosophy; care over language is no greater in the former than it should be in the latter. It is easily forgotten that words have no meaning of their own, endowed with an objective existence which one has only to specify in order to ensure exact understanding; that they only have the meaning which is conferred on

* Translation by Miss Judith A. Hammond of the article, "Diritto Positivo e Diritto Internazionale," in Vol. I, of *Studi in Onore di Tomaso Perassi*. It appears in German in Vol. 6 of the *Archiv des Völkerrechts*, No. 3 (August, 1957), at pp. 257-307.

¹ T. D. Weldon, *The Vocabulary of Politics. An Enquiry into the Use and Abuse of Language in the Making of Political Theories* 9 ff. (London, 1953).

² Another philosopher of the same school, L. S. Stebbing, *Logic in Practice* 51 ff. (4th ed., London, 1954), recalls how Aristotle first noted that words are only sounds to which a meaning is conventionally attributed. And yet, she observes, it is important to stress this "conventional element," because there is a tendency to forget it, and therefore not be sufficiently aware of the fact that meaning does not belong to the verbal sign as such, but only "to the sign as used." The author then gives a series of typical examples, both political and economic, of the confusion in thought caused in discussions by those taking part using the same word and giving it different meanings, often without warning.

In Italy Bobbio, "Scienza del diritto e analisi del linguaggio," in 1950 *Riv. trim. di dir. e proc. civile* 342 ff., and Scarpelli, *Filosofia analitica e giurisprudenza* 9 ff. (Milan, 1953), have pointed out the importance for legal science of this analysis of language carried out by analytical philosophy, founded as it is on the desire to control the use of language more strictly in order to introduce more exactitude into speech and to avoid ambiguities and misunderstandings.

them by use; and that therefore one must use them with the greatest care if the meaning one wishes to convey is to be correctly understood. Words are often not used in their sense which, being correspondent to the original etymological meaning of the word or, more especially, to the traditional and common use of it, is in fact more correct, because more apt to facilitate understanding and avoid ambiguity. So it often happens that discussions are falsified because different authors make use of the same term but give it different meanings, or on the other hand because they use different terms to mean the same thing. Further complications arise when an author uses the same word with different meanings without being aware of it, or at any rate without warning his reader. In all these cases the utility of scientific dialogue and of the confrontation of ideas is considerably compromised.

It seems appropriate to recall this before beginning a paper on the subject of positive law and international law, not only because, if these expressions are not clearly understood, it is vain to embark on an examination of the question, but also and more particularly because ambiguity of language is certainly at the root of some of the disputes which have developed and are still developing on the subject, and the ambiguity which has unfortunately crept into the use of certain terms is undoubtedly not one of the least considerable reasons for the difficulties which many continue to meet in discussing the subject with which this paper is concerned.

2. According to legal historians the term "*jus positivum*" is probably of mediaeval origin. In a passage of the *Summa decretalium* by the Bolognese Canonist, Damaso, published between 1210 and 1215, Kantorowicz came across an early definition of "*jus positivum*" as "*expositum ab homine*."³ Kuttner found the same term used by a number of mediaeval authors prior to Damaso, amongst whom is Abelard, whose definition of "positive" law he quotes as "*quod ab hominibus institutum*."⁴ Basing himself on these texts he comes to the conclusion that the Canonists of the Middle Ages used the words "*jus positivum*" to make a distinction between natural law and "*toutes les lois dont l'origine remonte à un acte législatif, comme par exemple les commandements que Dieu donna au peuple juif par la bouche de Moïse, ou les lois civiles et les 'canones'*."⁵

(Keeping close to the mediaeval Canonist tradition and basing itself directly on the etymology of the word, the internationalist doctrine of the 17th and 18th centuries always understood positive law to be that part of law which is laid down by exterior creative bodies set up for that purpose.)

³ The passage from Damaso, quoted by Kantorowicz, is the following: "Juris autem species sunt duae. Est enim jus naturale, quod natura animalia docuit. . . . Est etiam jus positivum sive expositum (lies: positum?) ab homine, ut sunt leges seculares et constitutiones ecclesiasticae." V. Kantorowicz, "Das Principium decretalium des Johannes de Deo," n. in 12 Zeitschrift der Savigny-Stiftung f. Rechtsgeschichte (Kan. Abt.) 440 and f. (1922); and Damasus, n., 16 *ibid.* 332 (1927).

⁴ St. Kuttner, "Sur les origines du terme droit positif," in 15 *Revue hist. du droit français et étranger* (4 Sér.) 730 (1936). The definition quoted is given by Abelard in his dialogue *Inter Philosophum, Judaeum et Christianum*: "Jus quippe aliud naturale, aliud positivum dicitur. Naturale quidem jus est. . . . Positivae autem justitiae quod ab hominibus institutum, ad utilitatem scil. vel honestatem tutius muniendam, aut sola consuetudine aut scripti nititur auctoritate. . . ."

⁵ *Ibid.* 728.

Pointing out the identity of the terms "*lex positiva*" and "*jus positum*" mentioned by Connan in his *Commentaria iuris civilis*,⁶ Suárez defined positive law as:

illam legem vocari positivam, quae non est innata cum natura, vel gratia, sed ultra illas ab aliquo principio extrinseco habente potestatem posita est.

And he added: "*inde enim positiva dicta est, quasi addita naturali legi, non ex illa necessario manans.*"⁸ (If, however, Grotius did not use the term "*jus positivum*" but "*jus voluntarium*"⁷ it is only because, having been inspired by the same Aristotelian source as Suárez and in agreement with him, he saw in the "positing" of a law an act not only of intelligence but also necessarily of will.) Later on Rachel uses the term "*jus positivum*" as a synonym for those words he uses more frequently: "*jus legitimum*" of Aristotelian origin and especially "*jus arbitrarium*." By the last he means to stress both the origin of this part of law "*a legislatorum libera voluntate*," and particularly in the case of international law, "*a pasciscentium vel contrahentium libera voluntate*," and its discretionary nature and its being inspired by a practical criterion of social utility rather than the protection of a higher moral requirement.⁹ (After this the use of the term "positive law" to indicate law which is created by an act of will became widespread; and those who continued the Grotian tradition in the 18th century, from Christian Wolff to Emer de Vattel and George Frederick de Martens, were agreed that "positive international law" within the body of law in force in international society is that part of law which is laid down by the tacit and expressed consent of the different states.⁹)

⁶ F. Suárez, *Tractatus de legibus ac Deo legislatore*, Conimbricæ, 1612, phot. repr. in The Classics of International Law. Selections from three works of Francisco Suárez (Washington, 1944), lib. I, cap. III, 13, p. 18. In the following paragraph 14 Suárez then divides "*lex positiva*" into "*divina*" and "*humana*," according to the Canonist tradition, deducing the distinction "*a proximo principio unde manat.*"

⁷ H. Grotii, *De jure belli ac pacis libri tres* (ed. Amstelædami, MDCCXX), *Prolegomena*, 12, p. X and ff.; 15, pp. XII and ff.; and lib. I, cap. I, XIV & XV, p. 17 and f. "*Jus voluntarium*" differs from "*jus naturale*" by its origin, and is divided by Grotius, too, into "*Divinum*" and "*Humanum*." Leibnitz also speaks of a "*jus voluntarium*" as distinct from natural law, and "*receptum moribus vel a superiore constitutum*"; see Leibnitz, *Codex Juris Gentium Diplomaticus* (Hannoverae, MDCXCIII), *Praefatio ad Lectorem*, p. 8.

⁸ S. Rachelii, *De jure naturae et gentium dissertationes*, Kiloni, MDCLXXVI, phot. repr. in The Classics of International Law (ed. by L. v. Bar, Washington, 1916), *diss. prima*, II-III, p. 2 and f.; VIII-IX, p. 5 and f., LVIII, p. 55; *diss. altera*, I-V, pp. 233 and ff.; XCII, p. 308; etc.

⁹ According to Wolff, *Jus gentium methodo scientifica pertractatum*, ed. acc., Francofurti et Lipsiae, MDCLXIV, phot. repr. in The Classics of International Law (ed. O. Nippold, Oxford, 1934), *Prolegomena*, § 25, pp. 8 and ff., "*Jus gentium positivum dicitur quod a voluntate Gentium ortum trahit.*" This voluntary law differs from "*jus gentium necessarium*," "*internum*," "*naturale*," on which it is based (see also Wolff, *Institutiones juris naturae et gentium*, Venetiis, MDCCXCII, pars quarta, cap. I, §§ 1089-1090, p. 374 and ff.) and it includes law which originates in the presumed (*jus voluntarium*), expressed (*jus pactitum*) or tacit consent (*jus consuetudinarium*)

It is also well known that the writers of this school and many others who follow them throughout the 19th century, do not consider that the law of the society of states differs in composition from that of the separate national societies; both are made up partly of natural law and partly of positive or voluntary law,¹⁰ this last being able to be created by the tacit or express consent of the different "*Gentes*" no less than by the unilateral will of an internal legislator. In other words, this dualistic composition

of states. The tripartition of consent used by Wolff is the one already indicated by Rachel, *De jure naturae, op. cit., diss. altera*, X, pp. 242 and ff., who had distinguished between the "*commune*" and the "*proprium*" (*particulare*) in the "*jus gentium*" (*arbitrarium*). For Wolff too "*jus voluntarium*" is common on the basis of the presumption that "*maxima pro voluntate omnium gentium habendum erat, quod maiori eorum parti visum fuerit*" (*Jus gentium, op. cit.* § 20, p. 7), while both "*jus pactitium*" and "*jus consuetudinarium*" are "*jus particulare*" (§§ 23 & 24, p. 8). Giuliano, "*La comunità internazionale e il diritto*," in Pubblicazioni della S. I. O. I., Studi, III (Padua, 1950), pp. 35, 61, going back partly to points made by von Ompteda and Nippold, observes that Wolff's "*jus gentium voluntarium*" is "*voluntarium*" only by virtue of the imaginary "*Civitas Maxima*" with a Rector at its head who is endowed with the power of laying down laws, and that it is therefore voluntary only in name. This objection can be allowed if it is understood that Wolff includes under voluntary law a law which would be defined today as non-voluntary; and it would also stand for Wolff's "*jus consuetudinarium*" and for the "*jus voluntarium*" of Grotius and those 17th, 18th and 19th-century authors who base customary law on the consent of states. Giuliano maintains (p. 27) that the "*consensus*" would not have been understood by the whole of classical doctrine to be a manifestation of will so much as a manifestation of psychological feeling, the "*common sentiment*" of the peoples. Put in these words, however, the assertion needs some reservations, no less than the parallel affirmation (pp. 19, 35) which is that in Wolff and in Vattel, the *Jus naturae* would no longer fulfill a precise function within the scientific construction of the international order. However, the interesting thing for us is that Wolff qualifies "*jus voluntarium*" as "*positive*" only insofar as he can show it to be voluntary in some way, by making it derive from the presumed consent of states.

The division of law adopted by Vattel is identical with that of Wolff; see Vattel, *Le Droit des gens ou principes de la loi naturelle appliquée à la conduite et aux affaires des Souverains* (nouv. éd. par P. Pradier-Fodéré), Tome I (Paris, 1863), *Préliminaires*, § 27, pp. 105 and f. For C. F. De Martens, *Précis du droit des gens moderne de l'Europe* (2ème éd. par Ch. Vergé), Tome premier (Paris, 1864), Introduction, §§ 5, 6, p. 44 and ff., the "*droit des gens positif et particulier*" rests on tacit or recognized conventions or on simple customs, but is distinguished from the "*droit des nations naturel, universel et nécessaire*."

¹⁰ See for example Klüber, *Droit des gens moderne de l'Europe* 1 and f. (nouv. éd., Paris, 1861), for "*Ce droit (des Nations) est naturel, en tant qu'il dérive de la nature même des relations qui subsistent entre les États, positif lorsqu'il est fondé sur des conventions expresses ou tacites*." The adjective "*positive*" is used similarly in the thought of the 19th century to indicate the particular part of international law in force which is produced by the consent of states, as opposed to that part for which the adjective "*natural*" or "*necessary*" is reserved. See Manning, *Commentaries on the Law of Nations* 66 (new ed. by S. Amos, London, 1875); Sir Robert Phillimore, 1 *Commentaries upon International Law* (3rd ed., London, 1879), c. III, XXII, p. 15; Travers Twiss, 1 *Le droit des gens ou des nations* (nouv. éd. rev., Paris, 1887), Ch. VI, p. 134 (this author uses "*positif*" and "*établi*" as synonyms); Fiore, 1 *Trattato di diritto internazionale pubblico* (4th corr. ed., Turin, 1904), cap. II, pp. 115 and f. (Fiore defines positive law as "*jus positum*"); 1 Ferguson, *Manual of International Law* 63 (London, 1884); Bonfils-Fauchille, 1 *Traité de droit international public* (8th ed. rev.), Pt. I, 22 (Paris, 1922).

is held to be typical of the law in force in both types of society, and in both it is positive law which depends for its existence on natural law, because it is a norm of natural law which confers the power to set up obligatory norms on the will of the national legislator on the one hand, and on the consent of the states on the other.

3. One cannot say that the substantial unity of the idea of international law in the thought of the 18th and 19th centuries was impaired because a different attitude towards the problem of the relationship between positive and international law was taken by the school which denied the existence of a "positive" part of international law and saw this as composed entirely of "*jus naturale*." The idea of positive law followed by this school did not differ in fact from that of Suárez and Grotius in substance but only perhaps in scope. For Pufendorf "*jus positivum*" meant still and more than ever law laid down by voluntary acts; furthermore, under the influence of Hobbesian¹¹ ideas, he regarded as a voluntary act capable of creating positive law only the emanation of a precept from a superior legislator, and not an agreement between different sovereign states.¹² It follows that Suárez' and Grotius' dual idea of natural law-positive law, admitted by Pufendorf in the case of national law, was denied by him in that of the law of the society of nations, which he held only to be natural law.)

If positive law thus came to be excluded from the field of international law,¹³ it is due to the fact—the consequences of which will not fail to be felt in later thought—that the scope of the concept of positive law had become narrower. But this did not prevent Pufendorf's thought from resembling that of those predecessors whom he contradicted. For him as for

¹¹ T. Hobbes in *Leviathan* (London, 1651, re-ed. by M. Oakeshott, Oxford), Part 2, Ch. 26, 7, p. 186, had divided laws into natural and positive, defining the latter as "those which . . . have been made laws by the will of those that have had the sovereign power over others."

¹² S. Pufendorff, *De jure naturae et gentium libri octo* (ed. ult. Amstelodami, MDCLXXXVIII), phot. repr. in *The Classics of International Law* (ed. W. Simons, Oxford, 1934), lib. I, cap. VI, § 18, p. 77: "lex . . . dividitur in naturalem et positivam . . . haec est . . . quae ab solo legislatoris arbitrio proficiscitur." After this the author goes on to deny "positivum aliquod jus gentium, a superiore profecto." Hobbes' and Pufendorf's ideas on the exclusion of the existence of a "*jus gentium positivum*" are shared by various writers: see C. Thomasii, *Fundamenta juris naturae et gentium ex sensu communi deducta* (Halaë et Lipsiae, MDCCXIII), lib. I, c. V, §§ XXIX-XXXIV, p. 108 f., §§ LXV-LXXVIII, p. 115 f.; J. W. Textoris, *Synopsis juris gentium* (Basileae, MDCLXXX), phot. repr. in *The Classics of International Law* (ed. L. v. Bar, Washington, 1916), cap. II, 4-6, p. 9; J. Barbeyrac, in the notes on the translation of *Le droit de la guerre et de la paix* par Hugues Grotius, tome premier (Basle, MDCLXVIII), p. 56, n. 3; and also substantially T. Rutherford, *Institutes of Natural Law* (Cambridge, MDCCCLIV-LVI), Vol. First, Ch. I, V, p. 8; Vol. Second, Ch. IX, I, pp. 462 ff.

¹³ With this conclusion Pufendorf and his followers did not intend to deny the legal character of international law as Giuliano has quite rightly pointed out in *La comunità internazionale*, *op. cit.*, pp. 33 f., 75 f., showing that for these writers "*jus positivum*" was only a *kind*, an aspect, a *form* of law. Therefore if the norms followed in relations between states were norms *jus naturale*, this only meant that they were norms of another type of law, but still of law.

them it was the fact that law comes from determined and pre-established extrinsic creative factors which confer a positive character upon it: positive law is therefore always, and even more especially, "*jus positum*."

And so to conclude, traditional thought, in spite of its different attitudes, never gives up the basic idea that the adjective "positive" joined to the noun "law" stands to indicate the particular way in which the existence of the law so qualified came about historically. And this thought always sees positive law as being necessarily limited to only one part of that law which it considers as being endowed with obligatory force: a part which can even annul itself altogether, as in international law according to Pufendorf and his followers, but which can never extend to include the whole of the law in force in a given legal system.

4. If with the passing of time so-called legal positivism opposed the traditional doctrine, it was because the new school of thought, which quarreled with the possibility of considering any principle of *jus naturale* as law or, at any rate, deduced by reason, came to see positive law as the only "true" law and therefore the one legitimate object of study for legal science.¹⁴ It is from this attitude that the positivist doctrine of law took its name. The idea that it is derived from the philosophical school of the same name is not correct, and it even expressly denied any link with that school.¹⁵

¹⁴ "The matter of jurisprudence is *positive law*": with these words Austin begins his treatment of the subject. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (abr. by R. Campbell, thirteenth impr., London, 1920), part I, sec. I, introductory, p. 5. "Ein . . . nicht positives oder Naturrecht . . . kein Erkenntnisobjekt der Rechtswissenschaft, weil juristisch überhaupt gar kein Recht ist," Bergbohm offers on his side. *Jurisprudenz und Rechtsphilosophie*, Bd. I (Leipzig, 1892), p. 549. Later on Carré de Malberg, "Réflexions tres simples sur l'objet de la science juridique," in *Recueil d'études sur les sources de droit en l'honneur François Génys*, I (Paris, 1937), pp. 201 and ff., will confirm that: "la science juridique se trouve toujours ramenée à ne connaître que du droit positif . . . elle répugne à l'idée du droit incréé, c'est-à-dire non édicté—ou tout au moins estampillé—par une autorité attitrée, tout comme la nature a horreur du vide."

¹⁵ To clarify the meaning of the term "positive" Bergbohm, in *Jurisprudenz*, *op. cit.* 51, in a note observes: "Mit dem 'Positivismus' und der positiven Philosophie Aug. Comtes . . . hat dieser Terminus natürlich nichts zu thun." He is decidedly opposed to those philosophers' ideas on law (see also p. 311). In spite of this some authors hold that there remains some link of derivation between legal and philosophical positivism. Morgenthau in "Positivism, Functionalism and International Law," 34 *A.J.I.L.* 261 (1940), after having pointed out that positivist philosophy "restricts the object of scientific knowledge to matters that can be verified by observation, and thus excludes from its domain all matters of an *a priori*, metaphysical nature," goes on to say that legal positivism transfers this restriction into the sphere of law. The fact that legal positivism turns its attention not to all possible manifestations of law, but, as the same writer points out, only "to the legal rules enacted by the state, and excludes all law whose existence cannot be traced to the statute books or the decisions of the courts" is certainly not the result of an application of the experimental principle put forward by the positivist philosophy, to which it is obviously opposed (and Morgenthau recognizes this on p. 269). It is rather a consequence of the influence of *a priori* principles of different schools of philosophy, some of which preceded the positivist school.

These same points can be of value in respect to the assertion of Del Vecchio in *Dispute e Conclusioni sul Diritto Naturale* 7 and f. (2nd ed., Rome, 1953), that Bergbohm's identification of law with positive law is a consequence of the "prejudice" on the part of

However, the idea of positive law held by the positivists is not really different from that of traditional thought, and it is, like the latter, clearly bound up with the way in which law comes into existence. It is rather thanks to the positivist doctrine, often more careful than the earlier one in defining its conceptions, that a more precise definition was sought for this old idea. Positive law is, for the positivists as well, law which is laid down (*gesetzt*), and the character of positivity is always conferred on the legal norm by its being derived from some creative act which actually came into being, thus being historically perceptible. "*Positives Recht sein und auf einem geschichtlichen Wege ins Dasein als verbindliche Regel gesetzt sein, ist schlechthin ein und dasselbe*," says the strictest theoretician of positivism, Karl Bergbohm.¹⁶ The meaning of this "historical" be-

positivist philosophy, whereby the only knowable reality is that of the senses. The same writer (Sulla positività come carattere del diritto, Modena, 1911) had, however, been obliged to point out how philosophers of other schools had come close to the idea of this identification: Vanni had made this point before him, while criticizing Petrone in "La filosofia del diritto in Germania e la ricerca positiva. Nota critica," in 22 Riv. it. per le scienze giuridiche 80 and f., 92 and f. (1896), with particular reference to Lasson. However, it is Hegel himself who asserts in Grundlinien der Philosophie des Rechts (hrsg. E. Gans, 2d ed., Berlin, 1940), Einleitung, § 3, p. 24 and f.: "Das Recht ist positiv überhaupt . . . und diese gesetzliche Autorität ist das Prinzip für die Kenntnis desselben, die positive Rechtswissenschaft." It is interesting to note that, following this tradition, the representative of the most modern German neo-idealistic movement, Binder (Grundlegung zur Rechtsphilosophie) will repeat almost a century later (the work came out in 1935) that positive law and only positive law is law, and that its validity and force rest on the "identity of its existence and of its being laid down."

The necessity of avoiding confusion between juridical positivism "consistant à n'admettre le droit que sous sa forme positive," and philosophical positivism has been strongly affirmed by Gény in "La notion du droit en France," Archives de Philosophie du Droit et de Sociologie juridique, prem. année, 1931, p. 26, note 1. Waline agrees with this affirmation, for the most part, in "Positivisme philosophique, juridique et sociologique," Mélanges R. Carré de Malberg 519 and ff. (Paris, 1933). If this writer recognizes the existence of a link between positivism in philosophy and positivism in law (which he divided again into "legal positivism" and "sociological positivism"), it is only in the sense that, in his opinion, a follower of philosophical positivism could not admit the existence of a natural law.

¹⁶ K. Bergbohm, Jurisprudenz und Rechtsphilosophie 546. See also the note on p. 52: "Alles Recht ist positiv, alles Recht ist 'gesetzt,' und nur positives Recht ist Recht." In German terminology the identification of positive law with "gesetzt" law had already been made by Hegel, Grundlinien, *op. cit.*, dritter Teil, § 211, p. 265, and it will be found again in more recent authors like Stammer who, in Theorie der Rechtswissenschaft (Halle, 1911), II, p. 3, translates the Latin word "positivum" as the German "gesetzt." For Lasson, System der Rechtsphilosophie (Berlin, 1882), § 25, p. 231, law is "eine äusserliche Ordnung mit dem Charakter des Fixierten" and in this sense it is "*positives Recht*." In English thought, Austin, Lectures, *op. cit.*, part I, sec. I, lec. V, p. 60, justifies the term "positive law" by the fact that it is a question of law "set by men." Among the Italian philosophers of law of the same period a positivist like Vanni, Lezioni di filosofia del diritto (race. per O. Petrone, Rome, 1900-01), lit., p. 96, defines law as "*norma in civitate posita*"; and an author, who is a critic of German positivism and defends the theoretical legitimacy of natural law, like Petrone, "Contributo all' analisi dei caratteri differenziali del diritto," in 22 Riv. it. per le scienze giuridiche 340 (1896), considers *positive* law to be law "storicamente avvenuto e divenuto," as opposed to natural law "meramente ideale e potenziale";

ginning is further outlined by him. In order that a norm of positive law may exist, a juridical nature must have been conferred on it by a "competent" body of legal production, through a proper procedure which is externally recognizable and belongs therefore to history, thus constituting a "formal source" for the norm in question.¹⁷

In the positivist doctrine the same thing happened, therefore, as we have just seen came about in traditional thought: that is, a further limitation of the meaning of "positive law," which, however, now was identified with the idea of law itself. Not only was it stated that law created by formal sources is the only true law, but all those acts which are not direct or indirect manifestations of the will of the state are excluded from the category of "formal sources" of positive law, for only the state has the power to lay down legal norms. This limiting conception just described is shown in English doctrine, where the ideas of Hobbes, previously mentioned, were brought into line with strict positivism by Austin and the followers of his school. They only recognized as law those laws which are laid down directly by a political superior or are at any rate the results of his will.¹⁸ The same conception found even more favorable conditions in Germanic doctrine where it was particularly aided by the Hegelian idea of the state.¹⁹

and in the continuation of the same study he identifies the objectivity of law with its "*determinazione esteriore e positiva*" and sees in the *Décis*, the *Satzung*, the laying down of law, its truly distinctive character, its "*forma essenziale*" and the "*vero fondamento*" of its existence.

¹⁷ *Jurisprudenz u. Rechtsphilosophie* 549. See also by Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* 40 and f. (Dorpat, 1877): "Ein Recht ist positiv, im Gegensatz zu einem bloss gedachten . . . wenn und soweit er der 'erklärte Rechtswille einer Rechtsquelle ist' . . . nur die Erklärung . . . durch den competenten rechtsbildenden Willen macht es zum positiv geltenden." Here the link with Hegel is clear. Hegel, having stated that law is positive inasmuch as it is "in seinem objektiven Dasein gesetzt," points out that "die positive Rechtswissenschaft ist isofern eine historische Wissenschaft, welche die Autorität zu ihrem Prinzip hat." (*Grundlinien*, *op. cit.*, dritter Absch., § 212, p. 268 and ff.) Besides the numerous writers quoted by Bergbohm (p. 41, n. 2), Nippold is also in agreement, *Der völkerrechtliche Vertrag* 18 (Bern, 1894): "Wir verstehen also unter Recht, positivem Recht . . . den Inbegriff derjenigen Normen, die thatsächliche Geltung haben, weil sie die erklärte Wille der rechtsschaffenden Autorität sind." Later on, Somló, *Juristische Grundlehre* 87 (Leipzig, 1917), defined law, which he identified with positive law, thus: "Das Recht ist eine Norm, die einer bestimmt gearteten Quelle *entstammt*." In the Italian positivist doctrine Vanni, *Lezioni*, *op. cit.* 96, speaks of the positive norm as "thought and willed by certain minds and established externally in a fixed form."

¹⁸ J. Austin, *Lectures*, *op. cit.*, Pt. I, sec. I, lec. VI, p. 60: "Every positive law, or every law simply and strictly so called, is set by sovereign power, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme." Similarly Holland, *The Elements of Jurisprudence*, Ch. IV, p. 41 (10th ed., Oxford, 1906): "A Law, in the sense in which that term is employed in Jurisprudence, is enforced by a sovereign political authority. . . . In order to emphasise the fact that laws, in the strict sense of the term, are thus authoritatively imposed, they are described as 'positive' laws."

¹⁹ Since the state is for Hegel (*Grundlinien*, *op. cit.*, dritter Absch., § 257, p. 305) the "Wirklichkeit der sittlichen Idee," law cannot but depend on the state and have its reality in the state. Consequently (§§ 211-212, p. 265 and ff.) he identifies "was Recht ist und gilt" with "das Gesetz" and affirms that "hat-nur als Recht Verbind-

The idea which reduced legal positivism itself to a mere state voluntarism was widely accepted; and the myth of the will of the state as the only origin of law was created.²⁰ This myth becomes rooted deeply in the thought of various countries and its harmful consequences are felt particularly—if certainly not exclusively—when it comes to understanding the international legal system. Now once having accepted the positivist assumption of the identity of law and positive law, to make use of a solution like Pufendorf's, which denied the existence of a positive international law, would be purely and simply to deny the existence of any international law at all. This is precisely what some authors do when they relegate this "law" to the field of moral or of "rational" law, of mere usage or of so-called "international relations," etc.²¹ Most of them, not

lichkeit was Gesetz ist." He therefore must conclude that even in relations between sovereign states law does not have its "Wirklichkeit" in a general will "zur Macht über sie konstituirten," but in their own particular will (§ 333, p. 419).

²⁰ "Der Staat ist die einzige Quelle des Rechts," Rudolph von Ihering affirms curtly in *Der Zweck im Recht*, Vol. I, 2nd ed., p. 318 (Leipzig, 1884). "Der verpflichtende Staatswille ist Recht." Georg Jellinek states for his part *Die rechtliche Natur der Staatenverträge* (Wien, 1880), p. 6. The entire dependence of law on the state has also been asserted briefly by Lasson, *System*, *op. cit.* 412; by Nippold, *Des völkerr. Vertrag*, *op. cit.* 18 and f., and later by Hölder, "Das positive Recht als Staatswille," in 23 *Arch. f. öff. Recht* (1908), and Somló, *Juristische Grundlehre* 330, for whom "die Quelle, aus der das Recht fließt, letzten Endes die Rechtsmacht des betreffenden Staatswesens selbst ist." At the beginning Kelsen, too, in *Hauptprobleme des Staatsrechtslehre* 97 and ff. (Tübingen, 1911), adopted the principle that objective law is the will of the state and that (p. 101) "alles Recht . . . soferne es Recht ist, Wille des Staates sein muss."

Under the influence of German legal thought the idea of the dependence of law on the state was widely accepted at the beginning of this century by theorists of both public and private law. Romano names the most important of these in *L'ordinamento giuridico*. *Studi sul concetto, le fonti e i caratteri del diritto*, Pt. I (Pisa, 1917), p. 96, note 1, at the beginning of a criticism of the concept indicated here. This criticism is approved and confirmed successively by Orlando, "Recenti indirizzi circa i rapporti fra Diritto e Stato," in *Riv. di dir. pubblico*, 1926, first part, p. 273 and ff. Also on this point see Del Vecchio's criticism in "Sulla statualità del diritto," *Riv. int. di fil. del diritto*, anno IX, fasc. 1, 1929, p. 3 and ff. Among modern writers "statualità" is considered to be a necessary feature of the legal system by Carnelutti, *Teoria generale del diritto* 75 (Rome, 1951, 3rd rev. ed.). However, the writer explains that by this formula he means the principle of systematization or completeness, and that "statualità" should not be understood to mean that the state is its source, as many in fact do understand it."

In France the theory which makes all law depend on the state was less well received. Of the more recent writers the most determined representative of this school of thought is Carré de Malberg, *Contribution à la théorie de l'État*. Gény also recognizes the same idea in substance, although much less dogmatically and with some reservations. Gény, *Science et Technique en Droit privé positif*, I, pp. 55 and ff., 63 (Paris, 1914): "Le droit positif ne s'établit que grâce à une société fortement organisée et renfermant en elle-même un pouvoir capable de préciser et d'imposer, par des moyens adéquats, les règles qui en forment le contenu nécessaire"; the only "droit positif dont nous puissions avec fruit serrer de près la notion" is law which is "constitué dans et par l'État."

²¹ According to Austin, *Lectures*, *op. cit.*, Pt. I, sec. I, lec. V, pp. 65, 74 and f.; lec. VI, p. 85, the rules generally known as "international law" are of "positive international morality," and of "international morality" according to Pomeroy, *Lec-*

wishing to deny the existence of international law and yet wanting to maintain the idea that all law has its origin in the state, sometimes make ingenious, but inevitably vain, attempts to reconcile two obviously irreconcilable elements. This is, however, not the place to consider these attempts, which are already too well known.

5. The aspects of positivist thought which I would like to clarify here are different. (Once having affirmed and defined the traditional idea of positive law, as we have already seen, this doctrine asserted at the same time that "positive" law is also the only law "in force." The innovation introduced by legal positivism did not therefore consist of a revision of the idea of positive law but of the reduction of all law to positive law. It meant the exclusion of any juridical norm, which had not been laid down in an externally recognizable manner by a formal source, from an historically existing legal system, and from having obligatory force. "Positive law" thus became a term applicable to all existing law, to any form of law which has been so created in history, as opposed to all forms of abstract and ideal law, or law created only by thought.) Besides positive law and positive legal norms "positive legal order" was now spoken of to stress this idea that a system of law in force is always made up exclusively of norms "set" by certain creative bodies; it is the same in the case of "positive legal science" which was so called in order to reassert the principle that legal science can only have positive law as its exclusive object of study.²²

(The most important consequence of the adoption of this outlook was that "legal character" was necessarily destined to become, for the posi-

tures on International Law in Time of Peace, § 28, p. 23 and ff. (ed. by Woolsey, Boston and New York, 1886). For Wheaton, *Éléments du droit international*, Pt. I, Ch. 1, § 10, p. 22 (2d ed., I, Leipzig, 1852), "entre les nations il n'y a qu'une obligation morale résultant de la raison" and it is only in a metaphorical sense that international law can be called law. Stephen, *International Law and International Relations*, Introduction, IV ff., 10 ff., 45 ff. (London, 1884), is convinced that relations between states are always non-legal; according to Lasson, *Prinzip und Zukunft des Völkerrechts*, 8 ff., 35 ff., 52 ff., etc. (Berlin, 1871), there are only non-legal "Staatensitte" in relations between states; Hagens, *Staat, Recht und Völkerrecht* 34 (München, 1890), sees international society as a mere "Interessengemeinschaft" and international law is reduced to mere rational law, to "ein vernunftpostuliertes Recht."

In more modern thought a writer like Burekhardt, *Die Organisation der Rechtsgemeinschaft* 351 ff. (zweite neu durchges. u. ergänzte Aufl., Zürich, 1944), does not admit the existence of a positive international law because it is not created by manifestations of the will of an authority, and he reduces international law to a merely rational law. Also for Carnelutti (*Teoria generale* 75 ff.), international law is not true law because it lacks "that completeness which is expressed through the idea of 'statualità'." Giuliano (*La Comunità internazionale* 75 and 93 f.) has called attention to the link between the attitude to international law taken up by writers like Carnelutti and that of 19th-century authors who followed the teaching of Austin. It is also interesting to notice the relatively similar outlook of an author like Stephen, above mentioned, and a modern writer like Corbett, *Law and Society in the Relations of States* 8 ff., 91 ff. (New York, 1951), for whom states now follow "patterns of practice" in their relations, rather than real legal norms.

²² E.g., Nippold (*Der Völkerr. Vertrag* 2 ff., 12, etc.) speaks of "positive Rechtsordnung" and, like Hegel, of "positive Rechtswissenschaft" and "positive Rechtslehre." Later others will follow this example.

tivists, a merely reflected feature, deriving simply from the fact that some norms come from a definite origin, and that they are the product of a given creative process. In other words, law was not in their eyes a phenomenon which could be distinguished by certain characteristics of its own and for the effects it had; in the end it was only something which had been created by a given body in a given way. Internally law is that which the state has willed, internationally it is that which several states have willed and established collectively. From the principle indicating that the distinctive character of law, of all law, is its historical derivation from certain pre-established "formal sources," there comes logically, as a corollary, the idea that legal science has no other means of knowing the legal force of a norm in any given system but to ascertain whether it was "laid down" historically by a "formal source" of that system. Thus the method of deducing the legal nature of the norms from their origin in given creative factors is considered to be the only one permissible in this science.

What is interesting is that these conclusions concerning the nature of "legal character," and the method which legal science could use to determine it, were destined to survive the very premises of legal positivism with which they were so closely linked. When convictions have been accepted for a long time in a doctrine it is easy to lose sight of their derivation from certain assumptions; they therefore continue to be regarded as truths, even when these assumptions have been discarded.

This is exactly what did happen when, in the course of a critical revision of the positivist idea, the later theorists were led to realize not only the presence in every legal order of rules the existence of which did not seem to depend on the will of states, but also the certain existence of some legal rules which could not be proved to be the product of any definite law-making process. For indeed an understandable conservative instinct made it difficult to draw from such a realization the conclusion that it was necessary to put under review the notion, sanctified as it was by long acceptance, that the "legal character" of the law in force should always and only derive from its "having been laid down," and that law is something which has been willed and created by a given body in a given way. And consequently, when legal thought realized the insufficiency of the method which went back to the functioning of certain productive processes in order to establish the existence of rules, the persistent conviction that "legal character" was a derivative quality conferred on certain rules by their particular historical origin, was enough to stop the recognition of the legitimacy of legal science using a different method from that which was still considered to be exclusive, according to an opinion which had already had time to become generally accepted. This inevitably led to obstacles and hesitation towards recognitions and developments which should have followed logically.

6. If we consider now in its development the school of thought which followed the positivist school, we see how long and troubled was the maturing process before we can reach the recognition not only of the presence and operation in every single system of law, and particularly in international law, of a whole series of rules which have not been laid down by a special

law-making procedure, but also of the fact that the "legal nature" of these laws does not constitute an anomaly and that their existence can be recognized and proved by legal science by another method but no less validly than the existence of the rules which can be traced back to the activity of a source.)

The foundations for a criticism of legal positivism had already been laid to some extent by the assertions of its own more alert theorists. Defining the concept of the "formal source" by which law must be "laid down" in order to exist as such, Bergbohm, for example, speaks of a "*kompetente rechtbildende Macht*,"²³ almost in the same way in which, centuries earlier, Suárez had spoken of the "laying down" of positive law "*ab aliquo principio extrinseco habente potestatem*." Now the "competence" of the authority creating law has no sense if it is not a legal competence established by law;²⁴ if, in turn, law can only be the product of the law-making activity of a "competent" authority, there is clearly a vicious circle from which legal positivism cannot escape. This vicious circle is no less evident when, as we have seen, other writers of the same school say that the "laying down" of law must come about according to certain predetermined productive processes, because the determination of these forms and the establishment of procedures can obviously only be the work of law. Tomaso Perassi, in his study on the sources of international law, which in some ways marks the beginning of modern Italian thought on the subject, points out that only a "relevant legal fact," a fact, that is, which is in turn taken into consideration by another rule, can be the source of legal norms.²⁵ The legal nature of a rule is therefore deduced, not from the fact which has produced it materially and historically, but from that other legal rule which considers this "*fact*" as a "source" of legal rules.²⁶

²³ *Jurisprudenz*, *op. cit.* 549.

²⁴ "Wann ist eine normierende 'Macht' eine 'kompetente'?" Kelsen asks with reference to Bergbohm. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* 89, note 1 (Tübingen, 1920). And he replies: "nur darum sind ihre Normen 'positive' Rechtsnormen, weil sie—von *Rechtswegen*—kompetent ist, Normen zu setzen!" Similarly Ross, *Theorie der Rechtsquellen* 6 (Leipzig and Vienna, 1929), observes, with reference to the definition of law as "*l'oeuvre du pouvoir compétent*" given by Gény, that "die Kompetenz keine sinnlich wahrnehmbare Tatsache, vielmehr selber ein normativer Begriff ist und so wiederum das Rechtsproblem voraussetzt, das gelöst werden sollte." The same could be said with reference to Carré de Malberg, who insists, on the one hand (Contribution, *op. cit.* 207; *Réflexions*, *op. cit.* 203), on the notion of positive law as "*créé ou déclaré par l'autorité compétente*," and on the other (Contribution 67), denies the priority of law with regard to the state.

²⁵ T. Perassi, "Teoria dommatica delle fonti di norme giuridiche in diritto internazionale," 11 *Riv. di dir. internazionale* 196 (1917).

²⁶ Vanni (Lezioni 126) had already based the proof of the "legal nature" of a rule on the "pre-existing legal system," pointing out that "una norma giuridica deve considerarsi come l'ultimo anello di una catena, i cui anelli precedenti costituiscono appunto l'ordine giuridico preesistente, il quale attribuisce ad alcuni la facoltà di stabilire delle norme, e per conseguenza attribuisce carattere giuridico alle norme stabilite." And Romano, "Sui decreti legge e lo stato d'assedio in occasione del terremoto di Messina e di Reggio Calabria," 17 *Riv. di Dir. Pubbl.* (Pt. I) 260 and f. (1909), had noticed that "quando si indaga il fondamento obbligatorio di una legge, tale fondamento si rinviene in una legge precedente che stabilisce gli organi competenti ad emanarla ed i loro poteri."

Since, in the process of deducing the "legal nature" of every rule from a formerly existing "rule on legal production," one cannot go back indefinitely, the author concludes that a rule, "at least one," must be presumed, whose legal nature cannot be established with the same method, because it is that "rule on legal production" which concerns the first law-making fact beyond which it is impossible to find an earlier legal norm.²⁷

Following this conclusion the positivist criterion, which identified "legal nature" with "positive nature" because it excluded the possibility of any rule that was not laid down by "a source of a given legal system" having a legal character, and saw that character as the mere consequence of this laying down, had to stand the shock of a logically inevitable but extraordinarily important exception. Furthermore, it was, in fact, deprived of its meaning. The legal nature of any rule dependent on the first "norm on juridical production" did not now appear as a quality determined by the fact which gave birth to it; it was a quality which, directly or indirectly, was derived only from the legal nature of that first rule, which certainly was not the product of a source and could not therefore draw its legal character from such an origin.

Therefore it can be said that the recognition of the existence of rules in force which are "legal" but not "laid down" had now imposed itself in no uncertain manner, even if for the moment it was limited to one rule. But there still remained an obstacle to the admission of these rules. Once he had recorded the irrefutable need to recognize the existence of a norm, whose legal nature could not be established through the same deductive "scheme" on which the recognition of other rules depended,²⁸ Perassi did not investigate the possibility of a different method of determining the recognition of that particular rule. It is in fact well known that he considered this form of determination to be impossible, at least in the field of legal science he called "dogmatic," because of the single method by which it could formulate the judgment on the validity of any rule in a given system: that is, the method of deducing it from the validity of a preceding rule which considers as a "source" the fact which produced the rule in question. Legal dogmatism must limit itself to accepting as a postulate the existence and legal nature of the first rule of the system,²⁹ leaving the explanation of it to other "branches of knowledge" like sociology.³⁰

²⁷ T. Perassi, *loc. cit.* 197 and ff. Romano, *loc. cit.* 261, having pointed out also that in the search for the basis of all law "we must stop at some point having reached the first law," had, however, seen the origin of the obligatory force of this law in the "necessity which determined it," agreeing with his principle that necessity "is the first and original source of all law."

²⁸ T. Perassi, *loc. cit.* 199.

²⁹ "To pose the problem of the juridical nature of this rule," observes Perassi (*loc. cit.* 204 ff.), "is to pose the problem of the origin of the legal system. Dogmatism would cease to be dogmatism, if it was capable of solving the problem."

³⁰ *Ibid.* 202 and f. According to Perassi, sociology, in its branch concerning law, has the task of studying "le relazioni tra l'ordinamento giuridico e la società di cui è la sovrastruttura," while dogmatism aims at the scientific result "di conseguire la conoscenza sistematica di un ordinamento nella sua funzione di sistema di canoni di valutazione delle relazioni sociali" (see *Corso di istituzioni di diritto pubblico* (2d ed., Naples, 1922), Pt. I, *Introduzione alle scienze giuridiche* 20 and 23).

Legal science was now confined within the bounds of mere "dogmatics" and forced to renounce the possibility of solving the problem of the legal nature of the most essential rule of the whole legal system, the knowledge of which is its essential aim.³¹ This latter idea can only be seen and explained in the light of the conviction, mentioned earlier, and now well established, owing to the long rule of legal positivism, that juridical nature was only a character conferred on certain rules by their creation by definite bodies and according to determined forms; and that legal science could only recognize those rules which had been historically and externally created in this way. It was precisely the persistence of this conviction which prevented doubt from being cast on the value and consequences of the idea that the legal force of a rule in a given system could only be proved by showing that it was created by a formal source of that system. In other words, having recognized that one rule of the legal system, at least, the one which is considered to be the most essential, was not and cannot be a rule which had been "laid down," legal science was still not in a position to solve the contradiction between this fundamental recognition and the ideas on "legal character" which were still dominant. It therefore felt itself constrained to do nothing but presume the juridical nature of that rule as an undemonstrable truth.

Similarly, the conviction that only norms produced by a "source"—or rather, to use Kelsen's words, by an act that is perceptible by the senses and has taken place in space and in time³²—were legal and capable of being known by the science of law, was still the reason why the "*Grundnorm*," in which the Viennese School saw the indispensable point of departure for legal production, could only be presented as a mere undemonstrable hypothesis of legal science.³³ The writers of this school pointed out as well that an external event could not have the quality of a legal source in itself and that this quality could only be conferred on it by a rule;

³¹ With a variety of attitudes, which I shall not consider here, the idea of legal science as "dogmatic" and of its limitations has been criticized by the most recent Italian students of international law. See in this connection the ideas developed by Ziccardi, *La costituzione dell'ordinamento internazionale* 44 and ff. (Milan, 1943); Spertuti, *La fonte suprema dell'ordinamento internazionale* 114 and f. (Milan, 1946); and "Norme giuridiche primarie e fondamento del diritto," *Riv. di dir. int.*, 1956, fasc. 1, p. 26; Giuliano, *La comunità internazionale*, *op. cit.* 115 ff.; and this writer *Scienza giuridica e diritto internazionale* 44 f. (Milan, 1950).

³² This expression is used in the revised and augmented French edition of the *Reine Rechtslehre*; see Kelsen, *Théorie pure du droit* 33 and f. (Neuchâtel, 1953).

³³ The concept of the "*Grundnorm*" as being the hypothesis on which the unity of legal norms is based was introduced by Kelsen in "*Reichsgesetz und Landesgesetz nach österreichischer Verfassung*," in 32 *Archiv des öff. Rechtes* 216 and ff. (1914). Therefore, as he himself recognizes in the preface to the second edition of *Hauptprobleme der Staatsrechtslehre* (Tübingen, 1923), p. XV and f., it was Verdross, "*Zur Problem der Rechtsunterworfenheit des Gesetzgebers*," in *Juristische Blätter* (45 Jahr, 1916), who developed the idea of the basic rule as a constitution in the logical and legal sense and who presented it (p. 4) as a "*Wissenschaftshypothese*" necessary to give legal science a basis on which to construct systematically the material of positive law. The works of Pitamic and Merkl, which followed, completed the definition of this school's thought, showing the *Grundnorm* to be the hypothesis of legal knowledge and the basis of the "*Stufentheorie des Rechtes*" at the same time.

they concluded from this that the construction of a theory of the "dynamics of law" must start from one "*der Rechtsordnung begründende Ursprungsnorm, aus der sich das Rechtssystem ableitet*,"³⁴ i.e., from a first "*Rechtssatz*" which, unlike the others, was not "*ausserlich gesetzt*," but simply "*vorausgesetzt*."³⁵ But just because it was a question of a norm which had not been "laid down," its existence and validity as a legal norm were condemned to remain a mere hypothesis, even if this hypothesis was necessary in order to consider all "positive" norms as legally valid and to interpret as law the empirical material which presents itself as such.³⁶ Remaining attached to the positivist idea of the necessity of every norm's being produced by a source in order to have legal validity, Kelsen was forced to contradict himself. He had to assert, even quite recently, that law is always "positive" law—in the literal and traditional sense, since for Kelsen its positivity lies in the fact that it is created and annulled by human acts³⁷—while he himself has recognized that the most important of all the norms, the one whose juridical nature conditions that of all the others in his opinion, is not "positive" because it "is not created in a legal procedure by a law-creating organ."³⁸ And the same fact pre-

³⁴ H. Kelsen, *Das Problem der Souveränität* 93.

³⁵ Thus Verdross, "Völkerrechtsquellen," in 3 *Wörterbuch des Völkerrechts und der Diplomatie* 293 (fortges. u. hrsg. v. K. Strupp, Berlin and Leipzig, 1929). The same idea had already been expressed in similar terms by this writer in *Die Verfassung der Völkerrechtsgemeinschaft* 21 (Vienna and Berlin, 1926): "... die oberste Norm, die *Grundnorm*, nie und niemals durch einem Organakt gesetzt, sondern selbst zur Begründung der obersten Organakte schon *vorausgesetzt* werden muss." Küntzel expresses himself similarly in *Ungeschriebenes Völkerrecht, Ein Beitrag zu der Lehre von der Quellen des Völkerrechts* 1 (Königsberg, 1935). "It is not a law which is laid down, but merely one which is presumed," says Morelli on the subject of the "fundamental law" in *Nozioni di diritto internazionale* 7 (4th rev. ed., Padua, 1955). Also according to Guggenheim, *1 Traité de droit international public* 7 (Geneva, 1953), "la norme fondamentale . . . est présumée et constitue l'hypothèse première et indémontrable pour la science juridique, d'où dérivent les règles positives."

³⁶ "Die Grund—oder Ursprungsnorm—als Hypothese," writes Kelsen (*Allgemeine Staatslehre* 104 (Berlin, 1925)), "muss von der Rechtserkenntnis eingeführt werden, um das Recht zu begreifende Material . . . 'Recht' zu erfassen." And he confirms this in the more recent *General Theory of Law and State* 116 (Cambridge, 1946): "To interpret these acts of human beings as legal acts and their products as binding norms, and that means to interpret the empirical material which presents itself as law as such, is possible only on the condition that the basic norm is presupposed as a valid norm."

³⁷ *General Theory, op. cit.*, 114.

³⁸ No less clearly, according to Morelli, *Nozioni, op. cit.* 22, the fundamental norm is not a *positive* norm because it does not originate from a formal source; and according to Guggenheim, *Traité, op. cit.* 7, the fundamental norm, not having been created by a law-making procedure, "n'est donc pas elle-même une norme positive."

In pointing out the contradiction that the presence of the "non-positive" basic norm represents in relation to the assertion of the necessary "positivity" of all the norms of law, the writer had shown (*Scienza giuridica, op. cit.* 40 ff.) that in order to deduce the validity of "positive" norms from the validity of the "non-positive" basic norm the latter must belong to the same world as the former. He had then remarked that if the positive norms constitute, as Kelsen says, the empirical material to which the jurist must be able to give a systematic unity, the basic norm must be presupposed to live in the same empirical world as the positive norms. Scarpelli, in *Filosofia analitica, op. cit.* 68 f., had objected that from the point of view of the "normativische" legal science,

vents this author and others of the same school from taking that further step which could otherwise be made towards the recognition on the part of legal science of the existence and the not merely hypothetical knowableness of an empirical law, valid and forceful without having been laid down by "sources," once the essential fact had been realized—that the reason for the "legal nature" of at least one norm, undoubtedly endowed with this character and undoubtedly valid, does not lie in an act of "laying down."

Later on, making use of the breach opened by the admission of the existence of a first "norm on legal production" with a "non-positive" origin, the recognition of the presence in every legal system, no longer of a single norm, but of a whole group of fundamental norms which do not originate in the functioning of a formal source, was accepted in legal thought. But there still persists the idea that these norms, because they are such, are only explicable historically and cannot be acknowledged by legal science except as postulates.³⁹ However unsatisfactory it may appear, this conclusion is a way of multiplying the number of postulates whose existence legal science can acknowledge without being able to prove it. It is clear that this conclusion is still imposed by the conviction, already recalled and from which it is difficult to liberate oneself, that "legal char-

the positive legal norms are not "living" in the empirical world, and that therefore it is not necessary to think that the fundamental norm is also living in the empirical world. This is not the place to linger over such an affirmation which contradicts the clear assertions of Kelsen himself. It is enough to observe that Scarpelli himself later on stressed logically, if on another level, the necessarily identical nature of the fundamental norm and the other normative propositions towards which the former acts as a "criterion of control of validity." This only confirms the foundation of the point made; that is, of the contradiction between the affirmation of the positivity of all legal norms on the one hand, and the necessary recognition of the existence of a norm, belonging to the same system and endowed with same nature, which is, however, clearly not positive, on the other.

³⁹ Perassi adopted this outlook right from the first edition of his *Lezioni di diritto internazionale*, Pt. I, p. 35 (Rome, 1933), and he has not altered it in later editions. "Lo stesso è a dirsi per le altre norme dell'ordinamento internazionale, il quale, come ogni altro, oltre che dalle norme create da atti o fatti che esso stesso contempla come processi di produzione giuridica, è costituito da un gruppo, sia pure estremamente scarso, di norme fondamentali, la cui formazione è solo storicamente spiegabile, e la cui giuridicità nell'ordinamento internazionale è quindi un postulato." Similarly Balladore Pallieri already affirmed in the first edition of his *Lezioni di diritto internazionale*, Fasc. I, lit., p. 29 (Milan, 1935): "Also the international community has, and cannot but have certain supreme norms which give validity to the others but receive it from none; norms that the jurist finds inexplicable." The latter, he reconfirmed in his 5th edition of *Diritto internazionale pubblico*, p. 14 (Milan, 1948), "parte assiomaticamente da alcune norme sopra cui impernia tutto il sistema e di cui presuppone, senza dimostrarlo, il valore." This assertion is omitted in later editions of the same work (see 7th ed., Milan, 1956, p. 16 ff.) in which, though without being very clear, the author seems to follow the criticism of more recent thought in taking up the idea of the demonstrability, by inductive methods, of the existence of "original" international unwritten norms (see p. 23 f.). Castberg, *Problems of Legal Philosophy* 50 f. (Bergen, 1947), follows the same order of ideas as Perassi. He states the existence of a number of "fundamental norms" which are not "positively determined norms" and "the validity of which we postulate."

acter" is a character necessarily connected to the origin and the method of creation of law, and that therefore the only admissible way of proving the legal nature of a norm is by deducing a proof from the legal nature of the law-making fact which created it. In other words it is now clearly and definitely realized that a legal system in force is composed, even if in very different proportions, of norms "laid down" by law-making facts and of norms "not laid down." But the original idea of the "positivity" of all law in force is still with us in its consequences, which make legal character appear as a mere effect of a certain "laying down." This imposes the conclusion that only "laid down" norms can be known and so prevents legal science from fulfilling its function towards the other category of norms condemned to remain scientifically inexplicable.

Still later on, following the logical consequences of the ideas just mentioned, the most modern internationalist thought reacted against the idea of a limitation of the scope and possibilities of legal science, against its reduction to mere legal dogmatics and against the conviction of the applicability by it of a purely deductive method. But the idea of legality's being a character given to certain norms essentially by their being created by determined "sources" continued, often unconsciously, to be an obstacle to the achievement of looked-for results.

In fact, different authors have tried to overcome their difficulties by having recourse to new ideas of positivity. But while they do not get the hoped-for assistance from this, mostly for the reason already mentioned, they contribute, on the other hand, to the growing ambiguity of language concerning the concept of "positive law." This, as we shall see, also constitutes a posthumous legacy of positivism and forms a further obvious hindrance to the clarification of the problem considered here.

7. The reduction of law to the product of given law-creating facts, carried out by legal positivism, could not in the long run be devoid of consequences even in the linguistic field. Within the field of positivist thought it was logical that some attributes of the term "law," such as "positive," "in force," "historical" and even "valid" and "efficacious," should have been considered by some people as pleonastic, since it was not admitted that one could speak strictly of a law which was not positive and in force, valid and efficacious at the same time. However, although these same attributes came naturally to be seen as different aspects all necessarily present in the same phenomenon,⁴⁰ this grouping together could

⁴⁰ "Die Prädzierung des Rechts als 'geltendes' oder 'positives' enthält ohne Zweife einen Pleonasmus," says Bergbohm (Jurisprudenz 49). But he immediately adds that it is a useful pleonasm for avoiding ambiguity with regard to those who may have the idea of a law of another kind. On the same page he adds: "Wir sprechen z. B. vom dem 'geltenden' Recht . . . von seiner formellen 'Giltigkeit.' . . . Wir meinen damit soviel wie Wirksamkeit, Verbindlichkeit, besonders geartete Verpflichtungskraft der als rechtliche bezeichneten Normen, kurz dasjenige im Recht, was da macht, dass man ihm zu gehorsamen verpflichtet ist." Further on, p. 132, he confirms: "Die positivrechtlichen Normen haben eben diese ihre Eigenschaft durch einen geschichtlichen Vorgang erhalten, ohne den sie überhaupt nicht hätten geltendes Recht werden können." Agreeing with these remarks, Nippold (Der völkerr. Vertrag 7) says there is absolute cor

not but have the effect of losing the idea of the respective autonomy and independence of these different aspects. Despite the fact that these adjectives were originally intended to express profoundly differing concepts, their permanently being together tends gradually to rub away the edges of each one so that the adjectives themselves become synonymous and even interchangeable.

A real transposition in the use of the same term from one meaning to another, took place very seldom at the beginning and almost unconsciously. Within the positivist school itself it is only in some writers that we begin to find the expression "positive law" no longer in the literal and traditional meaning of law "laid down," but transferred to indicate law existing in history or even law effectively applied.⁴¹ It is in the school of thought following this that transposition becomes more frequent and is done more openly as we approach recent times. It is characteristic that instead of being checked by the growing distance of those original canons of positivism which would in some way have been able to justify it, this tendency to use the expression "positive law" in a different sense seems almost to be favored by such distance. Whatever may be the reasons for this—some will be made clear further on—the fact remains that gradually we reach that ambivalence, or rather polyvalence, of meanings of "positive law" which is a characteristic of the present situation.

In fact if one examines the vast field of the thought of the last thirty years from this point of view, one is struck by the plurality of different ideas of positive law which have been adopted.

First of all there is the important group of those who still remain faithful to the literal and traditional usage. Among German legal philosophers Stammler carries on, even in his most recent works, the identification of "*positiv*" with "*gesetzt*" and the idea that positiveness is a manifestation of a definite legal will.⁴² His critic, Binder, also consistently makes clear that the meaning of "positive" law is the same as law laid down by human

respondence between the concepts of positive law and law "in force." The adjectives "*positivo*" and "*vigente*" are used to mean the same thing by Anzilotti, *Corso di diritto internazionale* 17 (3rd rev. ed., Rome, 1928): "Oggetto della giurisprudenza è il diritto positivo; suo compito primo determinare e spiegare le norme vigenti, ordinandole nella forma logica di un sistema."

⁴¹ Bierling does this, for example, 1 *Juristische Prinzipienlehre* 3 (Freiburg and Leipzig, 1894): "... alles Recht im juristischen Sinne nur als positives, d.h. irgendwo und irgendwam geltendes, auf irgend einen bestimmten Kreis von Subjekten beschränktes Recht"; and p. 47: "positives Recht ist, oder als solches erscheint, was irgendwo und irgendwam als Recht gilt." In Romano (*Sui decreti legge*, *op. cit.* 261) can be found a slight sign that would indicate the adoption of an idea of positive law as corresponding, within the law of the state, to all the norms "which are enforced by State organs." This author can certainly not be considered as belonging to the positivist school.

⁴² R. Stammler, *Theorie der Rechtswissenschaft* 74 ff. (2nd ed., Halle, 1923); *Lehrbuch der Rechtsphilosophie* 94 and f. (Berlin and Leipzig, 1922). The author explains the concept "*des positiven oder gesetzten Rechts*" by pointing out that "*'Positives' Recht ist das bedingte rechtliche Wollen*" (*Theorie* 75; *Lehrbuch* 95). Faithful to positivist canons he therefore adds that all historical law, in all its possible forms and manifestations, is positive law, "*gesetztes Recht*."

will and brought by this will into objective existence.⁴³ This adherence to the traditional meaning is also characteristic of the German writers who resort to the normative school of thought with more or less varied attitudes; in their view all law is substantially positive law, since it is law laid down, except—as we said earlier—for the basic norm, existence of which cannot be demonstrated and which must either be considered as an undemonstrable hypothesis or a postulate, or as a moral norm.⁴⁴ In Switzerland Burekhardt defines positive law as “*durch die Erklärung einer Autorität inhaltlich festgelegtes Recht*.”⁴⁵ In French thought Carré de Malberg also in his latest works still supports the idea of the norm of positive law as a “*règle édictée par des autorités capables de contrainte*” and of the positive legal order as “*créé ou déclaré par l'autorité compétente*,”⁴⁶ and an author like Dabin sees the whole “*droit positif*” as a system “*des règles de conduite édictée d'avance par l'autorité publique*.”⁴⁷

In Italy Anzilotti has constantly maintained throughout all his works that the definition of positive law is “law laid down by a law-creating will, which is binding just because it is laid down by such a will”;⁴⁸ Salvioli identifies positive law with voluntary law;⁴⁹ and Morelli has recently affirmed once more that positive norms are norms which have been laid down, created, by means of suitable procedures of legal production.⁵⁰ There are also some authors who react explicitly against the use of the term “positive law” in other senses and who draw attention to the inconveniences of this. Bobbio stands out among these for the clarity with

⁴³ J. Binder, *Grundlegung*, *op. cit.* 150 of the Italian translation.

⁴⁴ Kelsen always adheres to the use of the term “positive law” in the traditional sense of law “laid down.” “Positiv, das heisst wörtlich ‘gesetzt,’” he says in *Das Problem der Souveränität* 93, “ist somit die einzelne Rechtsnorm, sofern sie in dem auf der juristischen Hypothese der Ursprungsnorm einheitlich gegründeten System einer bestimmten Rechtsordnung gesetzt ist.” We have already seen how in his most recent works he has confirmed the idea that the positivity of a norm lies in its having been created by a law-making act which was set up in time and place. Similarly, according to Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage des Völkerrechtsverfassung* 77 and f. (Tübingen, 1923), and *Die Verfassung*, *op. cit.* 6 f., the “positivity” of law lies in its “Erfüllung durch *tatsächlich* gesetzte Rechtsakte.” Verdross also upholds this idea in the most recent edition of his *Völkerrecht*, p. 18 (3rd ed., Vienna, 1955). Also Guggenheim, “Was ist positives Völkerrecht?” in 8 *Schweiz. Jahrb. f. internat. Recht* 50 and f. (1951); and 1 *Traité* 7 (Geneva, 1953), although he sees positive law and law in force or “*wirksam*” as expressions meaning the same thing, maintains that the positivity of a norm is always given by its creation through an act of the will of a subject conforming to a law-making procedure whose point of departure is given by the fundamental norm, which is an hypothesis and not a positive norm.

⁴⁵ W. Burekhardt, *Die Organisation der Rechtsgemeinschaft* 351.

⁴⁶ R. Carré de Malberg, *Réflexions* 194, 203.

⁴⁷ J. Dabin, *La philosophie de l'ordre juridique positif spécialement dans les rapports de droit privé* 34 and f. (Paris, 1929).

⁴⁸ This definition is to be found in the third edition of the *Corso di diritto internazionale* 17 (Rome, 1928). In the first edition of the same work (Rome, 1912), p. 12, Anzilotti had asserted that “il diritto, come norma obbligatoria dell'umana condotta, non esiste se non in quanto è *posto* da una volontà idonea ad obbligare i consociati.”

⁴⁹ G. Salvioli, “Les règles générales de la paix,” in 46 *Hague Recueil* (1933, IV) 6, 9, 11.

⁵⁰ G. Morelli, *Nozioni*, *op. cit.* 22.

which he asserts the principle that the limitation of the scope and therefore the definition of the concept of positive law can only be made "through the appropriate use of the idea of a source," and for the firmness with which he therefore maintains that "the body of laws which can in some way be referred to a source, that is produced by law-creating acts . . . is positive law," openly deducing from this that if there is a law, valid but not brought into being by these acts, it is not positive law.⁵¹

However, other writers oppose this first group. These are now proceeding in the other direction and are entirely abandoning the use of the word "positive" in the sense of "laid down by law-creating facts," and are purposely giving this term a different definition, which wavers between the idea of law "in force" and that of law "effectively applied and caused to be observed." It seems that one should include Del Vecchio in this group, for example. He answers the questions as to when law is really positive, how it is fulfilled, and of what its laying down consists by denying that it is enough or necessary for a criterion of juridical nature to have been formulated by a specially constituted organ, and states that the social organization must execute and observe this criterion itself. Positive law thus becomes that which is really applied and observed at a given historical moment, that which *informs and effectively rules* the life of a people; positive norms must be understood to be those which are "effectively imposed and applied."⁵² The character of positivity therefore moves away from that of historical derivation from determined law-making processes, and becomes that of effective observance, imposed by a "sufficient historical force." This change of meaning is still more clear-cut in Radbruch's thought. He defines the concept of "*Positivität des Rechts*" as "*die Wirksamkeit des Rechts in der Gesellschaft . . . seine Fähigkeit, sich in grösserem oder geringerem Grade die Gefolgschaft des Rechtsadressaten zu verschaffen*" and therefore concludes that "*Rechtspositivität*" and "*Rechtsgeltung in ihrer soziologischen Bedeutung*" are identical.⁵³ According to Cesarini-Sforza "law as it is revealed concretely, materially, in observable facts, is positive."⁵⁴

⁵¹ N. Bobbio, *La consuetudine come fatto normativo* 21 (Padua, 1942).

⁵² Sulla positività, *op. cit.* 14 and ff.; *Lezioni di filosofia del diritto* 234 f. (3rd rev. ed., Rome, 1936). Del Vecchio therefore clearly distinguishes between positivity and legality. The former is a logical property superior to events and passage of time, the latter a historical element, extrinsic and accidental.

Carnelutti, in the third edition of his *Teoria generale* 71 f., maintained that while "according to formula and tradition" the difference between *positive law* and *natural law* "would concern the source of the legal system," in fact the difference only exists in the sense that "natural law is a collection of unsanctioned precepts."

⁵³ G. Radbruch, *Grundzüge der Rechtsphilosophie* 179 f. (Leipzig, 1914). The author distinguishes between the positivity of law, identified with "*Rechtsgeltung*" in the sociological sense, and "*Geltung*" in the sense of a norm, which he finds corresponds to the "*Verbindlichkeit*" of law.

⁵⁴ W. Cesarini-Sforza, *Il concetto del diritto e la giurisprudenza integrale* 104 (Milan, 1913). This is a pleonastic adjective, the author adds, "if one considers the legal phenomena, which can only be observable facts, so that a non-positive law is inconceivable; but useful if one wants to indicate the effective verification of legal phenomena with respect to the norms."

A similar tendency can be found in a number of French writers who belong to that school of thought which Waline defined as "*positivisme sociologique*" as opposed to the true "*positivisme juridique*."⁵⁵ Thus Capitant and May apply the expression "*droit positif*" to "*droit qui est en vigueur*" and "*droit existant actuellement*" among a definite people.⁵⁶ Ripert and Boulanger call the "*règles juridiques en vigueur dans un État, quel que soit d'ailleurs leur caractère particulier*" *droit positif*.⁵⁷ Julliot de la Morandière considers positive law to be "*le droit appliqué en fait*," "*l'ensemble des règles qui gouvernent en fait à une époque donnée une société humaine déterminée*."⁵⁸ For Carbonnier positive law is "*le droit effectivement appliqué dans l'État et dans le moment où l'on se trouve*."⁵⁹

Among scholars of international law the use of the term "positive law" meaning "law which is actually applied" is clear in the case of Gihl,⁶⁰ whose thought has evidently been influenced by Hagerström's criticism of the positivist and statalist concept.⁶¹ Hold-Ferneck, criticizing the narrowness of Burckhardt's conception of positivity, indicates as positive international law those norms "*nach deren Staaten und staatsähnliche Verbände in der Tat leben*."⁶² And Küntzel, preoccupied with safe-

⁵⁵ M. Waline, *Positivisme phil.*, *op. cit.* 525 ff. "Legal positivism," represented, according to the writer, by Kelsen (who would have called it "critical positivism") and Carré de Malberg, consists of admitting, as a determining criterion of the legal value of a norm, only its conformity to a fundamental legal norm "*prise comme étalon des valeurs juridiques*." "Sociological positivism," represented particularly by Jèze and Capitant, still according to Waline, sees positive law as "*ce qui est effectivement appliqué en pratique, comme règle de droit, dans un pays donné à un moment donné*." See also by the same author, "Défense du positivisme juridique," in *Archives de Phil. du droit et de sociol. jur.*, *neuv. année*, 1939, p. 83 and ff.

⁵⁶ M. Capitant, *Introduction à l'étude du droit civil* 32 (4th ed., Paris, 1925); G. May, *Introduction à la science du droit* 57, 65 (2nd rev. ed., Paris, 1925).

⁵⁷ G. Ripert et J. Boulanger, *Traité élémentaire de droit civil de Planiol, refondu et complété par G. Ripert et J. Boulanger*, Vol. I, p. 2 (4th ed., Paris, 1948). "Ces règles sont *positives*," the two authors add, "en ce sens qu'elles forment un objet d'étude concret et certain; elles ont une formule arrêtée et précisée."

⁵⁸ L. Julliot de la Morandière, "Introduction à l'étude du droit civil français," in 1 *Introduction à l'étude du droit* (L. Julliot de la Morandière, P. Esmein, H. Lévy-Bruhl, G. Scelle) 173, 178 (Paris, 1951).

⁵⁹ J. Carbonnier, 1 *Droit civil* 24 (Paris, 1955).

⁶⁰ T. Gihl, *International Legislation* 18 (Oxford, 1937). For a definition of positive law Gihl returns to Bergbohm's term: *was als Recht funktioniert*, but he obviously gives it a different value. According to the German legal philosopher only law produced exclusively by formal sources could function as such, while Gihl considers that all law which is functioning in reality, whatever its origin, is positive law.

⁶¹ Criticism of the idea of law as a product of will, whether this will is that of the state or claims to be general, is to be found especially in two studies by Hagerström: *Is Positive Law an Expression of Will?* (first published in 1916), and *On the Question of the Notion of Law* (1916), both reproduced in *Inquiries into the Nature of Law and Morals* 17 and ff., 56 and ff. (ed. by K. Olivecrona, tr. by C. D. Broad, Stockholm, 1953).

⁶² A. Hold-Ferneck, *Lehrbuch des Völkerrechts*, Vol. I, pp. 1 ff. (Leipzig, 1930). "Positive normen," he adds, "sind gelebte normen. Sie treten uns in der *Erfolgung* entgegen, die das Miteinander und Gegeneinander des Staatslebens entspricht."

guarding the positivity of the "general principles of law," defines as positive not only norms laid down in an externally visible way by a visible authority, but all those which have been established in society as efficacious norms.⁶³ The attitude of a part of recent Italian internationalist thought is typical: It considers that one of its tasks is to give a new and more scientific definition of the "positivity" of law. This school believes that it could use a new definition of "positive law" in order to save the principle of the "positivity" of all legal norms and in particular of all norms of international law. It tries thus to overcome the difficulties which would otherwise arise from the fact of the existence of a norm, or a number of norms, of every legal system but particularly the international system, which do not appear as the products of "legal law-creating facts." Ziccardi, for instance, believing that only legal science can define a concept of positive law, and convinced that the one object of legal investigation must be positive law, groups under the heading of "positive legal science" both the idea of science having "positive law" as its own object and that of science which "assumes data of empirical experience" or which "refers to a world of external factors." The meaning which is usually given to the word "positivity" in the language of philosophical positivism when it accompanies the noun "science" is therefore transferred to legal language by Ziccardi to determine the value to be given to this same attribute when it is used to qualify the noun "law." Positivity is held therefore to belong to that law which science determines as a concrete object, on the basis of data of experience: everything which is found to be existing in the "positive world of fact" therefore becomes "positive law."⁶⁴ Sperduti had gone perhaps still further, in the sense of a departure from tradition, when he defined positive law, on the basis of a meeting of various elements, as an "efficacious" system of propositions which, besides being structurally legal and based on experience, are endowed with "normative validity."⁶⁵ In the end, however, this writer simplified his definition in the sense that "positivity is the same as its historicity, i.e. its setting itself up as an effective system of social organization."⁶⁶ Quadri, criticizing the definition of positive law as "*jus positum*," comes to see the distinctive character of the positivity of legal norms in the "coactive external guarantee" which they give. We therefore find him defining positive law in the sense that "whether or not it is laid down by acts of will" positive law is all "so-

⁶³ W. Küntzel, *Ungeschriebenes Völkerrecht* 82: "... der wahre Positivismus sieht das Wesen des Rechts nicht in festgefüigten, äusserlich klarerkennbaren Rechtssätzen, die eine sichtbare Autorität nach bestimmten Regeln als Recht erklärt. . . . Positive Völkerrechtsnormen sind nicht nur solche Normen, die im Verfahren des Staatenkonsenses erzeugt worden sind, sondern auch solche, die in der Staatengemeinschaft sich als wirksame Normen durchgesetzt haben."

⁶⁴ P. Ziccardi, *La costituzione* 88 ff.; especially 93 ff.

⁶⁵ G. Sperduti, *La fonte suprema* 108 f., 112 ff. According to him the concept of positive law thus expressed is the result of the fusion of two ideas: the first idea sees positive law as a social product, the second as that of the human spirit.

⁶⁶ G. Sperduti, *Norme giuridiche primarie* 30. Therefore, according to him, all norms included in the system are now norms of positive law.

cially guaranteed law.”⁶⁷ For Giuliano the method of creation of law in no way determines its “positivity.” According to him positivity is identified with effective strength in a given social group; it is a question of “sociality,” that is, of the norms which make up a given system corresponding to the “judgments of value” which are present and operate in a certain society. The concept of “positivity” absorbs those of “reality,” “validity” and “obligatoriness.”⁶⁸

There is, finally, a third group of writers whose use of the term “positive law” seems uncertain and promiscuous. Sometimes they give one meaning to the adjective, sometimes another, sometimes both together. In Laun’s teaching, for example, positivity is a fact which is given, at the same time, both by the heteronomy of legal commands and especially by their effective application and the fact that they are obeyed by the mass of those to whom they are addressed.⁶⁹

In Nawiasky’s conception in characterizing positive law it is difficult to distinguish between the idea of a “*tatsächliche Geltung*” or “*regelmässige Anwendung*,” and a “*Setzung*” or “*Position des Rechts*.” He speaks of “positivity” sometimes to indicate the social reality of law and its effective observance, sometimes to draw attention to the fact that norms have been laid down and are therefore an expression of the will of those who “*die Setzung vorgenommen haben*.”⁷⁰ For his part Coing defines positive law sometimes as “*diejenige soziale Ordnung, welche in einer konkreten sozialen Gruppe gilt*,” and therefore as a “*geschichtliche Erscheinung*,” and sometimes as a “*Willensatzung*” of a definite group.⁷¹ In France, Brethe de la Gressaye and Laborde-Lacoste define positive law at one time as law “*qui est en vigueur dans un pays à un moment donné*,”

⁶⁷ R. Quadri, *Diritto internazionale pubblico* 35, 79 f., 92 (2nd rev. ed., Palermo, 1956). Quadri gives no reason for his assertion that the definition of “positive law” can derive from its etymology (*jus positum*), however. See also, by the same author, “Le fondement du caractère obligatoire du droit international public,” in 80 *Hague Recueil* (1952, I) 587.

⁶⁸ M. Giuliano, *La comunità internazionale* 158, 223 and ff.

⁶⁹ R. Laun, “La positività del diritto,” in *Riv. di dir. pubblico*, parte prima, sez. II, anno XXV, 1933, p. 309 and ff., and especially p. 311: “The positivity of law is therefore only a state of fact. Positive law consists of those (heteronomous) orders, which are effectively applied, followed and imposed.” The author has also confirmed this conception of positive law in the article “*Naturrecht und Völkerrecht*,” 4 *Jahrb. f. internat. Recht* 37: “Dasjenige, was wir das positive Recht nennen, ist eine Summe oder ein System von heteronomen Befehlen, welche sich auf den organisierten Zwang des Staates stützen”; and p. 38: “Das positive Recht, auch das positive Völkerrecht, ist eine Summe von Kausalzusammenhängen, welche bewirken, dass bestimmte Befehle der Machthaber gegenwärtig und vielleicht auch in der Zukunft befolgt oder erzwungen werden. Positivität ist demnach Gehorsam als Massenerscheinung, sie ist *Massengehorsam*.” Constantopoulos agrees with Laun’s conception of positivity, *Verbindlichkeit und Konstruktion des positiven Völkerrechts*, Einleitung, p. IX and f. (Hamburg, 1946).

⁷⁰ H. Nawiasky, *Allgemeine Staatslehre als System der rechtlichen Grundbegriffe* 19, 24, 129 (zweite durchgearb. u. erw. Aufl., Einsiedeln, 1948).

⁷¹ H. Coing, *Grundzüge der Rechtsphilosophie* 226 f. (Berlin, 1950): “Das positive Recht . . . ist uns als historische Erscheinung gegeben, und in diesem Sinne positiv. . . . Das positive Recht gilt als Willensatzung.”

and at another as law decided and imposed by a creative will expressed "*par des . . . sources formelles.*"⁷² Among scholars of international law Balladore Pallieri sometimes uses the term "positive norms" to mean norms "laid down" having "their origin in a fact, in a procedure actually followed," at others he states that one can speak of the positivity of legal norms to indicate "those norms the regular observance of which is obtained from those, to whom the norms are addressed, by means of sanctions, coercion, or any other outside pressure which can be exerted."⁷³ Rousseau speaks of positive international law to indicate sometimes "*celui qui est effectivement suivi par les États et pratiqué par les tribunaux internationaux,*" and sometimes that which is "*effectivement posé par les organes compétents.*"⁷⁴ These quotations could be carried on indefinitely.

8. It is not difficult to realize how harmful the consequences of this long-standing linguistic confusion in the use of the term "positive law," instead of the original unity of meaning, can be to scientific investigation. And it is natural that these consequences should be particularly obvious where international law is concerned. For many reasons, this is the classic field for disputes not only on its positivity or non-positivity but also on its very existence as a legal system.

In making this point there is, however, no intention of saying that the reason for this confusion and its negative effects lies in the fact that beside the original legitimate meaning of positivity another less legitimate one has grown up. Nor does it mean that a new definition nearer to truth has not yet succeeded in finally overcoming the earlier and less "true" definition. Often some writer in his search for a new and more satisfying definition of the "positivity" of law gives the impression that he wants to obtain the "true" meaning of positivity itself. What was said at the beginning of this article, however, should remind us that words do not possess their own intrinsic meaning; the object to pursue is not a greater "truth" in definition, but only the assurance of greater clarity and less

⁷² J. Brethe de la Gressaye et M. Laborde-Lacoste, *Introduction générale à l'étude de droit* 7, 170 *et seq.* (Paris, 1947).

⁷³ G. Balladore Pallieri, *Diritto internazionale* 9, 22 (7th ed.). In the *Corso di diritto costituzionale* (2nd ed., Milan, 1950), the same writer states, on p. 5, that "Law is called positive law because of its belonging to a social organisation actually existing," and on p. 44 he indicates as the principle of the "positivity" of law the need for its norms "to be laid down to gain strength and to create an effectively working legal system." At p. 22 ff. of *Diritto internazionale* Balladore Pallieri replies to a point made by the author in *Scienza giuridica*, p. 95, note 1, "that the term natural law, in some ways correlative, is used with many meanings, and that it is obvious, therefore, that the term positive law used as its opposite, will take on just as many meanings." Setting aside all reservations concerning the interdependence of the two expressions, it is strange that Balladore Pallieri should not be aware of the fact that the eventual plurality of meanings attributed to the term "natural law," far from justifying the attribution of a similar number of meanings to the term "positive law," rather adds to the confusion and ambiguity of a scientific debate in which correlations, which are in fact different, seem to be the same only because different things are meant by the same words.

⁷⁴ 1 Rousseau, *Principes généraux de droit international public* 38, 42, 52 (Paris, 1944).

ambiguity in use. This aim has not been achieved because of the ambiguity which has crept into the use of the word "positive."

It sometimes happens that controversies arise over the "positive" or "non-positive" nature of the same norm or group of norms, without there being any quarrel as to the origin of the norms, but solely, even if unconsciously, on the basis of the different meanings attributed to "positivity." So it is that, as we have seen, Kelsen and the writers who are most directly influenced by his concept, consider as "non-positive" the fundamental norm which they see as the fountainhead of the international system, because they identify positivity with the laying down by legal law-creating facts, by formal sources, which cannot be envisaged in the case of the first norm. Whereas others like Ziccardi attribute a positive character to this norm, he shares the idea of a basic norm whose existence cannot be deduced from a "source," but he holds on the other hand that the positivity of a norm is simply its existence in the empirical world, however this has come about.⁷⁵ Similarly, it happens that in the broad doctrinal dispute about "general principles of law" and their value in the international order we find, for example, writers like Charles De Visscher, Spiropoulos and Verdross, who attribute a non-positive but certainly obligatory character to these principles.⁷⁶ This is because these writers consider the part of international law which they qualify as positive to be made up only of

⁷⁵ Sperduti (*La fonte suprema* 76) has quite rightly pointed out that the so-called basic norm both in Kelsen's system, Perassi's early system, and that of Ziccardi, is a positive norm if the opinion of the latter were to be favored. It must always be considered as a non-positive norm, however, if the positivity of a norm depends, "as Kelsen and traditional thought maintain, on its being traced back to a source."

⁷⁶ According to Charles De Visscher, "Contribution à l'étude des sources du droit international," *Rev. de Droit int. et de Lég. comp.*, 1933, pp. 405 ff., not only the general principles of law recognized by the civilized nations are excluded from positive international law, but their mention by Art. 38 of the Statute of the Permanent Court of International Justice has explicitly recognized the insufficiency of positive international law, composed by formal sources such as custom and treaty, and the necessity of admitting as an indispensable complement the existence of other international norms based on natural law. Spiropoulos, *Die allgemeinen Rechtsgrundsätze im Völkerrecht* 63 (Kiel, 1928), states that the principles in question have the character of natural law, and puts them in the category of non-positive but "obligatory" international law. According to Verdross, "Les principes généraux du droit dans la jurisprudence internationale," 52 *Hague Recueil* 203 (1935), one must distinguish clearly between the norms of positive customary and conventional international law, and those principles of law which, not yet having penetrated into positive law, are implicitly presupposed by it. This writer's outlook has not changed substantially in the latest developments of his thought. In the third edition of his *Völkerrecht*, p. 23, he attributes to the general principles of law the function, which is extremely important for the construction of international law, of "die Grundlage des positiven Völkerrechts zu bilden." He now formulates the moral norm, which he sees as the basic norm of international order, in the sense that "sich die Völkerrechtssubjekte so verhalten sollen, wie es die allgemeinen Rechtsgrundsätze und die auf ihrer Grundlage erzeugten Normen des Vertragsrechts und des Gewohnheitsrechts vorschreiben" (*ibid.* 25). Despite the fact that they are directly covered by the "völkerrechtliche Grundnorm," Verdross still considers the general principles of law as "Grundsätze" which remain above and outside positive law when, and inasmuch as, no "positivization" on the part of a customary norm of an international instrument has taken place.

those norms which they regard as actually having been laid down by formal sources, that is to say, customary and conventional norms. However, another writer who generally keeps close to the same point of view, Küntzel, sees the "*allgemeine Rechtsgrundsätze*" as part of positive international law,⁷⁷ not because he differs from the others in imagining the existence of a special formal source apart from treaties and customs, and set up to create these principles; nor because he believes, like some others, that its positivity is based on the positivity of a norm customary or otherwise, which would expressly establish its force; but only because—as we have already seen—he bases his argument on a broader conception of positive law by which positivity is substantially identified with efficacy. It is interesting to note that Spiropoulos, replying to criticisms of his conception of the general principles of law as having the character of natural rather than positive law, but being at the same time endowed with effective authority in international relations, acutely observes that the problem of the nature of these principles depends only on the meaning given to the terms "positive law" and "natural law."⁷⁸

However, the prejudicial consequences of the ambiguity which has arisen about the idea of "positivity" are not confined to these apparent contrasts between views which are substantially similar. It is more important that this ambiguity inevitably helps to confirm and perpetuate positivism's fundamental error concerning the nature of "legality" and the means of acknowledging it. This in turn can only make it impossible to get those results which some writers had hoped to obtain by the rather dubious process of changing the meaning of the terms used.

One might think that the adoption of a new and wider concept of positive law to take in all law which is effectively in force and operating in a given human society, if carried out clearly, eliminating any reference to the way in which the law was created, ought to correspond to a definite abandonment of the idea of any relation between law in force and law which has been laid down. It ought even to allow for the necessary distinction to be made, under a different name, and within the wider field of law still in its entirety known as positive, between norms which appear as the product of law-making facts and those which are in force and working without being the product of any "source." It ought therefore to be possible to outline the different characteristics of these two categories of norms, even though both were qualified as positive, and to define the ways in which they each could be recognized, besides determining their relationship to each other.

In practice, however, this is all prevented by the fact that even though one has expressed agreement with a new and broader definition of positivity, one is unable to break completely with the old and narrower con-

⁷⁷ W. Küntzel, *Ungeschriebenes Völkerrecht* 82 ff. The author reaches the conclusion of the positivity of general principles of law on the basis of the fact that they have shown themselves to be "*wirksame Normen*" in international society. Like Verdross, Küntzel maintains that the general principles of law "*die 'formellen Quellen' des Völkerrechts, Vertrag und Gewohnheit, gegenüberstehen,*" and that they are still directly anchored to the ground norm of international order.

⁷⁸ J. Spiropoulos, *Théorie générale du droit international* 107 (Paris, 1930).

cept. This happens because one is still convinced that the determining and distinctive character of a norm's legality depends on its creation by a definite act of "laying down," and that therefore one cannot recognize its existence as a rule of law except by proving that such an act took place. And whether one likes it or not, to qualify all law "in force" as "positive," even if one intends to give it another meaning, can only help to perpetuate this conviction. For example, Balladore Pallieri, having identified "positivity" with efficacy and regular observance guaranteed by sanctions and coercion, would have a sufficient basis for including the norms he calls original and fundamental among the positive norms, once he had pointed out, that is, that they are efficacious and their regular observance is guaranteed. Instead he still feels it necessary to specify a "laying down" of these norms; he feels he must assert, as we have already seen, that the norms in question are positive also in the sense of having been "laid down," having their "source" in a fact, in a process which actually happened even though difficult to prove. And he concludes "exclusively for this reason" that these norms can be considered as existing in the international community.⁷⁹

Now if it is obvious—as obvious as it is irrelevant to our immediate problem—that any norms existing in reality can only originate from causes or factors which have actually operated, even if this was in a way which cannot be determined or specified externally, it is no less obvious, first of all, that these causes and factors are quite a different thing from the "laying down" procedure; therefore these same causes and factors cannot be considered as law-creating facts, as "sources,"⁸⁰ but it is not even certain that, wherever they functioned, a process of "laying down" must also have taken place. Furthermore, it is very certain that it is no step forward to claim to refer to a "laying down" on a "source," which was not provided or

⁷⁹ Diritto internazionale 21.

⁸⁰ This essential difference, pointed out in *Scienza giuridica*, p. 79, has been clearly reaffirmed by Barile, "Tendenze e sviluppi della recente dottrina italiana di diritto internazionale pubblico (1944-1951)," in 4 *Comunicazioni e studi dell'Ist. di dir. internaz.*, Univ. di Milano 410 (1952); and "La rilevazione e l'integrazione del diritto internazionale non scritto e la libertà di apprezzamento del giudice," 5 *ibid.* 159 f. Sperduti also seems to realize the necessity for this distinction in his latest article on "Norme giuridiche primarie," p. 13 f., where he points out the difference between "a fact which bears exclusive and decisive relevance to the existence" of certain norms as legal norms, and of those facts as "antecedents," "factors," and "motives." Following these premises the writer goes on to say that in the case of the primary norms one cannot reconstruct a phenomenon "of psychical concrescence of law-creating factors with the force of an efficient cause of their legal existence." Because of this lack of an "fact of psychical consistency," whose specific function is to determine their legal existence, these norms are "norms of spontaneous law." One does not see how the author can reconcile these conclusions with the idea of a "source" for the "primary" norms, which has in common with the others, that is the "formal sources," set up as such by norms of the legal system, the "effect of determining the existence of legal norms" (p. 16). Apart from other considerations, where an "fact of psychical consistency," to use Sperduti's terminology, is clearly missing, there can be causes, reasons, factors, motives, but not a "source," not a "law-creating fact." If one counts causes and factors like this as sources, then the concept of a source changes fundamentally and loses its usefulness for legal science.

ordered by law, in order to deduce automatically the existence of some norms as legal norms. It is in fact a step backward in relation to the position reached by that school of thought which had effectively shown how the deduction of the legality of certain norms is only legitimate when based on a "legal" laying down and a "legal" source, arranged by the previous law for the creation of the new law; and how it cannot be effected without recourse to law-creating facts, which in turn possess the feature of legal nature.⁸¹ By imagining the existence of sources which were not set up legally, to explain the existence of norms which do not seem to be the product of legal sources, we are only returning to the original overcome ideas of positivism. Criticism had already pointed out for a long time that the premise necessary for the deduction of the legal character of norms produced by a certain "source" can certainly not be found in the actual material elements of the fact to which the value of a source is given, but can only be given by the legal character of the norm, which is the basis for the source's being considered as such.⁸² The return to so-called creative "facts," which remain as such and do not assume the aspect of law-creating "legal" facts, would still be irrelevant to the proof of the existence of a given norm as a norm of law, even if they were actually real: this proof must be sought in some other way. However, Ballardore Pallieri, who seems to be nearing the right solution when he admits that the existence

⁸¹ It is not easy to understand, therefore, how a legal philosopher like Guggenheim, (*Was ist positives Völkerrecht?* 53 f., n. 39), can think of qualifying certain norms as produced by "law-creating facts," for the simple reason that their content was determined "durch religiöse Vorstellungen und gesellschaftliche Gegebenheiten." It is from these premises that Guggenheim thinks he can deduce that "Auch diese sog., 'spontane' Normerzeugung kommt in einem Normerzeugungsverfahren zustande," disagreeing with the term "norms of spontaneous formation" given by this writer to those norms which do not appear as the products of real legal law-creating facts.

⁸² Ballardore Pallieri (*Diritto Internazionale* 18), recognizes this fundamentally when he asserts that the "sources," which he calls "original" because not effected by earlier norms, "cannot be defined in general terms, cannot have predetermined characteristics, and their force cannot derive from common, general characteristics which they possess; if this were so, if the presence of such characteristics were the basis of their force, it would postulate the presence of a norm which gives force to such general characteristics and confers the nature of a source on those acts which possess them." But if the character of sources must be conferred on certain facts by a norm, it is not possible to define, even as original sources, facts on which this character has not been conferred by a norm. One cannot understand the usefulness of the idea of a "source" which cannot be considered as such, either in virtue of a norm which effects it, or of its own intrinsic characteristics. There is also a certain confusion between the idea of a source and that of a norm in this recent expression of Ballardore Pallieri's thought. One cannot but agree when he says that in every system "there must be some original norms" (*ibid.* 19); and he puts himself in a position similar to that which this writer adopted (*Scienza giuridica* 78) in distinguishing "between those norms which can be said to be of *spontaneous* formation and those whose formation is the work of *law-making facts*," when he asserts (p. 18) that "besides a 'derived' formation of law, we therefore have an 'original' formation." But this statement cannot be reconciled with the assertion that "besides derived sources we also find 'original' ones." There is a contradiction in terms between the idea of an "original" norm and that of a norm derived somehow from a source, even if that source was "original."

of the international norms, which he calls original, can only be inferred from certain manifestations and effects which presuppose the existence of the norms,⁸³ not only contradicts himself but excludes all possibility of any useful developments from this admission, when he asserts at the same time that these norms can be considered to exist in the legal system of the international community because, and only because, they are "laid down" by a "fact."

In fact only when it has been clearly and finally recognized that certain norms can be qualified as legal because of characteristics belonging objectively to the norms themselves, because of their function as norms of law and not as a mere reflection of their origin, will it be possible to realize that legal science has at its disposal other means of reaching a knowledge of the norms which are its object, besides the reference to an historical "laying down" or to a creative fact which produced them. This reference, which should in any case be used with all due caution,⁸⁴ can only be employed as a means of ascertaining the presence in a given legal system of those norms which have real "sources" behind them, in the legal sense of the word. As for the remaining norms, a no less valid and sure proof of their existence can be attained, but it can only be based on what is, in fact, the only certain method of establishing the existence of legal norms, that is, on a verification of their functioning effectively as norms of law within the society in question. One of the uses of the fundamental distinction which must be made concerning the origin⁸⁵ of legal norms lies just here: in making clear that the method, whereby some of them can be recognized, cannot be used to recognize others. The deductive method, by whose application the idea of the legal nature of a norm is shown to be the inference drawn from the

⁸³ Diritto internazionale 23.

⁸⁴ Reference is made here to what was already made clear in *Scienza giuridica* 80 f., that in practice it is impossible to set aside entirely the search for an inductive proof of the real and actual existence even of those norms which have been regularly laid down by the "source" of a definite legal order. It can happen otherwise that a norm is believed to exist and function, which in fact has ceased to exist because of the later formation of a norm which does not owe its origin to a legal law-making fact anticipated by the order in question. On the power of abrogation which custom must be granted over law, and the special power which must be recognized to this effect in the field of constitutional law, see Romano's remarks in "Osservazioni preliminari per una teoria sui limiti della funzione legislativa nel diritto italiano" (estr. dall'Arch. di dir. pubbl., 1902, I), p. 24 ff.

⁸⁵ With reference to this distinction one must beware of believing that it is based on a more or less distant historical fact. Norms not deriving from formal sources not only arise at the beginning of the formation of a society, but are also continually arising after this. On the contrary written norms, of an original or revolutionary constitution, for example, are norms created by a real source in the legal sense, contrary to what Balladore Pallieri maintains in *Diritto Internazionale* 17 f. The laying down of constitutional norms by a certain original or revolutionary constituent assembly, for example, is a legal law-making fact, because a norm shows itself to be existing in the conscience of the members of society, which confers the necessary power on this assembly. This norm can certainly be said to be really original, in the sense that it was spontaneously formed in the conscience of the members and was not "laid down" by any creative organ, but the norms "laid down" by the assembly cannot. The assembly would produce "legal" norms even though it was not endowed with "legal" power to do so.

premise of the legal character of a pre-existing norm, can be of value with regard to norms which owe their existence to creative processes, which appear as legal law-creating facts in the light of pre-existing norms. To recognize all the other norms an inductive method is necessary;⁸⁶ that is the method which consists of inferring their existence from a convincing series of external manifestations, whereby it is proved beyond doubt that they live and function as legal norms within the order of that society and that they produce those effects which the science of law recognizes and characterizes as legal effects.⁸⁷ This distinction of the method which should be used to attain recognition of legal norms becomes a valuable criterion to confirm the truth or error of the solution given to the problem of widening alternatively one of the two categories of norms.

It is characteristic that a great number of authors who, while reacting against positivism, were induced to re-acknowledge the existence of norms which, however qualified, are commonly considered as the product of the operation of legally provided law-creating processes, are now trying to reduce the number of these norms to a minimum, and what is more, to one single norm, or one very narrow group of primary and fundamental norms. This happens not only in the case of those who are forced into caution by the still persistent conviction, already mentioned, of the possibility that legal science recognizes only norms created by legal law-creating facts. Even those who would like to break away from this dogma and who think it is the task of legal science to prove the existence of norms which cannot be traced back to facts of this kind, still seem to be afraid of deviating too

⁸⁶ The need for legal science to apply the inductive method, particularly in the case of international law, already explicitly recognized by some authors (see for example Ziccardi, *La Costituzione*, *op. cit.* 98 ff., 112, in Italy), has recently found a supporter in Schwarzenberger, *International Law*, Vol. I, p. XLVIII and ff. (2nd ed., London, 1949); and "The Province of the Doctrine of International Law," in *Current Legal Problems* 240 and ff. (1956). A reading of his remarks shows that Schwarzenberger, by opposing the deductive to the "inductive approach," intends to do away with the idea of a recourse to a *a priori* deductions from theoretical or rational principles, or to confusions between *lex lata* and *lex ferenda* in the construction of international law and the determination of its norms. By opposing the deductive to the inductive method he therefore wants to stress the need for vigorous adherence to practice, especially to that which results from jurisprudence, in order to determine the law in force. This is a preoccupation not without foundation, but which has little to do with the study in question.

⁸⁷ It seems appropriate to point out that the inductive method applied by legal science reaches the conclusion of a norm's existence from a series of single external manifestations of its function as a legal norm and from a recognition of the effects which it produces as such. This recognition must be certain, to permit a valid inference. One must therefore be particularly careful when maintaining (as, *e.g.*, Sperduti, *Norme giuridiche primarie* 14, and *La fonte suprema* 214 ff.) that the recognition of legal norms "can be reached by a last inference subsequent to the others." This is not to say that in some cases the existence of a norm cannot be inferred from the existence of other norms which necessarily presuppose it. But this can happen only if the existence of those other norms is ascertained from other sources, and that the norm inferred from them is not claimed as their "basis of legal norms": one cannot infer a truth by induction from facts whose existence can be proved only through the very truth which it is hoped to prove.

far from the dogma and of profiting by the results of their assertion.⁸⁸ These authors subsequently draw a line⁸⁹ between the first norm or group of norms on the one hand, and customary law on the other. This line is

⁸⁸ A writer like Ziccardi, for example, though he has reached the conclusion that legal science is a science that operates exclusively from facts given by empirical experiment, and having therefore, by stating the validity of the inductive method, overcome the identification of legal science with a limited dogma whose only task was to deduce proofs of former legal norms, still felt it necessary to limit the application of these results to one norm, that is, the "suprema norma sulle fonti." Recognition of all the other norms would be reached by means of a deductive approach from that first norm, and that "source" contemplated by it (La Costituzione 126). Still more recently, Sperduti (Norme giuridiche primarie 12) maintained that "primary" or "fundamental" norms "include, and only consist of one or more norms concerning legal production."

⁸⁹ One does not find a distinction of this kind in writers who have thoroughly understood the nature of *jus non scriptum*. Vittorio Scialoja, p.es., "Sulla teoria della interpretazione delle leggi," Note in *Studii giuridici dedicati e offerti a F. Schupfer*, Pt. III, p. 306 (Turin, 1898), speaks of this law as "a tacit fundamental law, which is an immediate emanation from ordered social forces which can be called by the now traditional term of customary law." He then adds: "All written law is based on this customary law, because the law which governs laws can only be essentially customary."

It is particularly significant that Anzilotti, in the famous manuscripts which he added to his *Corso di diritto internazionale* (4th ed.), *Con l'aggiunta di note inedite dell'autore e di un capitolo sugli accordi lateranensi*, Vol. I, *Opere di Dionisio Anzilotti a cura della S.I.O.I.*, p. 72, note 10 (Padua, 1955), maintained that "we must widen the concept of custom . . . to include what is true in the so-called necessary and constitutional law of international Society." Referring then to Raestad's work, "*Droit coutumier*" et "*principes généraux*" en droit international, Anzilotti refers to the latter's idea that there is no difference between customary law and general principles, "because general principles and the legal constitution have usage as their foundation," and he therefore deduces that it is proved "once more that one can give a wider meaning to the idea of custom in order to include the new general principles, in the sense of principles given with the constitution of the society in question." As for Raestad, he confirmed in a later posthumous work, *La philosophie du droit international public* 75 (Oslo, 1949), the idea of the fundamental unity of general principles and international customary law.

Giuliano (*La comunità internazionale* 179) points out quite rightly how, in writers who make a distinction between international customary norms and those other *super-ordered* norms which they call by different names, there is no "safe criterion of discrimination" between the two categories of norms. Again, according to this writer (p. 176), the adoption by many of the difference in name would in some way be a consequence of the necessity of making at least some fundamental norms of international law independent of the rigid scheme "of a source outside the consciences of the subjects" into which legal thought has more and more forced its representation of the "social factor which creates so-called customary law." However, historically, the idea of the so-called constitutional or fundamental principles was previous to the rigid forms of that description of custom as a law-creating procedure, based exclusively on the material element of *usus* to which Giuliano refers. Rather, that idea represents the slightest recognition of a logical necessity which legal thought, though restrained by the persistence of some canons of positivist derivation, could not deny altogether. If, in doing this, legal thought did not go so far as to include all *jus non scriptum* in the field of norms recognized as not produced by legally predetermined law-creating processes, but wished rather to make a clear separation between primary law on one side and customary law on the other, this seems simply to have been because of the difficulty of taking all at once such a vastly important step away from principles and ideas which previously had been almost entirely unquestioned.

based on a difference they claim between the two processes of formation, but it does not stand up to a critical examination. This is not the place to discuss the question whether in the vast field of *jus non scriptum* one can introduce, more or less legitimately or usefully, some distinction, e.g., with reference to its greater or lesser universality⁹⁰ or its different content, yet founded on criteria which have nothing to do with the way in which the norms were formed.⁹¹ It is, however, important to point out that no distinction can be based on the supposed fact that so-called primary or fundamental norms are not produced by legally anticipated and organized law-creating facts, whereas customary laws are, and that these last should be considered as secondary norms "laid down" by a law-creating process specially provided by one of those primary norms.⁹² The writer has al-

⁹⁰ As has already been observed (Scienza giuridica 90, note 1), logically there is nothing to prevent us from admitting the existence of particular norms, besides the general ones, within the framework of customary norms. But logically there is nothing which forces us to think that these eventual particular customary norms must have a different origin from that of other norms of *jus non scriptum*, and in particular from that of the primary norms of the order. The need that Sperduti had felt for this (La fonte suprema 159 ff.) derived solely from the fact that he still conceived both types of norms as being the product of specific law-creating facts; hence his preoccupation that the process of legal production of primary norms should be suitable only for the production of absolutely universal norms. If we think of both types as having no specific legal law-creating fact as their origin, it is clear that the eventual presence, besides norms which are shown to be universally valid in practice, of norms which prove to have force only in a narrower sphere, would present no difficulty and would cause no need for a hierarchical differentiation.

⁹¹ The irrelevance, for the problem of existence of international unwritten norms, of a distinction based on their content has already been pointed out by Barile, La rilevanza 161 f., who has also noted how international practice makes no distinction between principles and customs in the case of norms of international *jus non scriptum*.

Bentivoglio has given his approval to a distinction based on the content of norms, which aims at specifying, within the vast framework of unwritten international law, "a group of fundamental principles which give a clear expression of the essence and function of the order." "Interpretazione del diritto e diritto internazionale," in *Pubb. dell'Univ. di Pavia*, n. 119 (1953), p. 254 ff. It should, however, be made clear that according to this writer too the distinction he admits does not assume importance for the problem of the formation of norms of international unwritten law. In fact Bentivoglio also agrees with the idea that all universal international law is a law whose existence cannot be traced back to any qualified source of legal production.

⁹² The idea that one of the "primary" or "constitutional" norms of the international order anticipates and organizes custom as a specific "legal law-creating fact" of that order, is to be found in the Italian school of thought, for example, in Fedozzi, "Introduzione al diritto internazionale e parte generale," in 1 *Trattato di diritto internazionale* per cura di P. Fedozzi e S. Romano 43 (2d rev. ed., Padua, 1933); Ballardore Pallieri, *Diritto internazionale* 17, 20; Sperduti, *La fonte suprema* 209 ff., and *Norme giuridiche primarie* 12 ff., 24, note; Quadri, *Diritto internazionale* 81, 95; Monaco, *Manuale di diritto internazionale pubblico e privato* 48 ff. (Turin, 1949).

It is significant that if the writer from whom more or less all of those mentioned took the idea of the existence of "fundamental or constitutional principles" in the international community, that is, Romano, in his *Corso di diritto internazionale* 31 ff. (4th rev. ed., Padua, 1939), places a distinction between those principles and customary law, he bases this distinction exclusively on the fact that these principles were not formed gradually like customary law, but arose at the setting up of a community. He therefore has no thought of subordinating customary law to constitutional principles

ready had occasion to point out elsewhere how wrong it is to raise to the value of supposed moments of an imaginary legal law-creating process those so-called elements of custom which are nothing but the external data by which the existence and efficacy of a customary norm can be recognized, since it is a norm which is not otherwise manifested. And we saw then how attempts to present and describe custom as a "legal law-creating fact" had failed, and had been destined to fail.⁹³ One could add—and this is of importance to our study—that the error of excluding customary law from the field of law which is recognized as not being derived from legally pre-established law-creating processes, is still more obviously confirmed when one remembers that, in order to be able to recognize customary norms, legal science uses, and can only use, that same inductive method which it employs to establish the existence of those so-called primary or fundamental norms. This is generally the only method it can use in the case of all *jus non scriptum*.⁹⁴

so that one of these should anticipate custom as a law-creating legal fact creating secondary norms. Romano, unlike some of his followers, is really consistent in his conception of customary law as having an "almost unconscious and therefore involuntary" origin, or (Corso di diritto costituzionale 357 (7th rev. ed., Padua, 1943)), "as a norm spontaneously formed without a particular act of will." This is a conception which logically excludes the possibility of inserting the idea of a special law-creating fact, legally anticipated and organized, whose task is to produce customary norms.

A similar idea of customary law is to be found in Esposito, "Il controllo giurisdizionale sulla costituzionalità delle leggi in Italia," estr. dalla 5 Riv. di dir. processuale (1950, No. 4), who speaks of a "spontaneous rise and fall of legal rules in the field of custom, despite all the prohibitions of written law." Carnelutti (Teoria generale 34) says expressly that the customary formation of legal norms is purely "natural" and not "artificial" as is that of positive laws. Further afield, Olivecrona, Law as Fact 61 f. (Copenhagen-London, 1939), states that traditional customary law is not "formally constituted," and "is to a large extent developed more or less unconsciously."

⁹³ Scienza giuridica 84 *et seq.* On the difficulties which writers encounter in their effort to "make the action from which international customary law must have sprung, correspond with a process with more or less definite characteristics," see also Giuliano, La comunità internazionale 174 ff.

Sperduti (Norme giuridiche primarie 22 ff., note 22), wanted to make a final attempt at saving the idea that custom can be represented as a fact of legal production by imagining that the fact itself was a psychical creative action, though involuntary, whereby the conscience of the members would operate, so creating norms of law, because of a primary legal norm which would anticipate this action as a "source." The spontaneous formation of a norm in the conscience of the members of the social body, on which Sperduti bases his argument, can be a psychical concrescence. But this does not allow for it to be transformed into a psychical action which will "create" the norm in question. As I have already had occasion to make clear elsewhere, the birth of something cannot be presented as an action which will bring about this birth itself.

⁹⁴ The old expression "*jus non scriptum*," usually applied particularly to custom, did not mean a type of norm that was materially not written, so much as the type of norm which, not having been manifested by an appropriate creative act, can only be recognized as existing by the outward manifestations of its functioning in the conscience of members of the social body. Giuliano, in La comunità internazionale, *op. cit.* 179, observes correctly that also the "other norms of fundamental or constitutional or natural principles could only be recognized as existing on the basis of an analysis of

All these difficulties which legal thought encounters, despite the renewal of some points of departure, while trying to clarify the question of the different ways in which the law in force can be formed, and that of the essential distinction which must be established concerning them, all derive in the last analysis from the unresolved contradiction between two, or rather several ideas of "positive" law, and from which no definite choice has really been made. Despite assertions to the contrary and a professed agreement with different and broader conceptions of "positivity," the fact is that in practice it is impossible to give up completely an idea which is opposed to older tradition but firmly established by the profound influence of legal positivism. According to this idea all law in force is "positive" also in the sense of law "laid down," and that legality, rather than being a quality which certain norms are recognized as having because of certain specific characteristics of their structure and function,⁹⁵ is a character conferred on them by their origin, by their necessarily having been laid down. Until we are finally free from this idea, it is inevitable that we should end up by considering a purely material and not "legal" "laying down" as the determining factor of legality—and the fact that this "laying down" is carried out by one body rather than another, and takes place in this way rather than in another, obviously takes nothing from the arbitrariness of the conclusion—unless we are satisfied with merely postulating the premises of our deductions or a no less arbitrary assumption of them by a metajuridical sphere.

The profound though sometimes unconscious effect of the above-mentioned idea on even the most modern thought is proved by the attitudes of those writers of recent Italian internationalist works who have clearly repudiated the classic idea of "positive" law, and have proceeded along their own lines to a redefinition of "positivity" which aims at eliminating every link with the idea of "*jus positum*." Sperduti, for example, recognizes, as we saw, the existence of a small nucleus of primary and fundamental international norms, the first of which would be that which would confer the value of a legal "source" on the customary law-creating process. This nucleus is extremely small; and yet its positivity should not be doubted, even if it were proved that they were primary norms which had not been "laid down," since we know that the author gives a different meaning to this term. Despite this, however, he himself cannot give up the search for a source for a supreme law-creating fact even for these norms. This, he feels, can be found in the "process whereby international society is

fact and of international practice." More recently, the impossibility of establishing a distinction between customary norms and general principles, because of the identity of the procedures which the international judge follows in both cases, has been illustrated by Barile, *La rilevanza*, *op. cit.* 159 f.

⁹⁵ It had already been pointed out that the characterization of certain norms as legal norms must be based on the typical aspects of their way of operating, in *Lezioni di diritto internazionale* 7 (Milan, 1949-50), when the author indicated the specific value attached to the facts of social life by legal judgment as the element which distinguishes the legal sphere from those judgments of another nature. This idea has since been made clear and further developed in *Scienza giuridica*, *op. cit.* 69 ff.

fundamentally organized, itself laying down the highest principles of its own legal system," which he defines as a "pre-legal custom" as opposed to the other subordinate source of the customary norms, which he calls "legal custom."⁹⁶ This search for a supposed legal process creating primary norms ends, therefore, with the determination of a typically pre-legal fact which—apart from any other consideration—cannot, because of its very nature,⁹⁷ be used to prove that the norms "produced" by it are rules of law. The continued need for finding a "supreme" source can, therefore, only have been felt because of the persistence, in spite of everything, of some kind of idea that norms whose legality and positivity are affirmed on other grounds can become more "legal" and more "positive" if it can be established that they were also "laid down" by some creative organ. For his part Quadri defines "primary" law, which has a position of "pre-eminence of force" over all other international legal norms, as "positive" law which must, however, be clearly distinguished from "*jus positum*."⁹⁸ However, he still thinks it indispensable, in order to explain their legal validity and efficacy, to make these primary norms depend on a "will," a "decision" of the social body, on what is substantially a "laying down" on the part of a supposed "supernational Authority." In fact he speaks in this way of these norms as having been "laid down *directly* by the social body." However suggestive, this is no more than a "*factio*," and, since it still only leads to the indication of a purely pre-legal fact, it can be of no use, for the reasons I have already stated, as a premise from which to "deduce" the "legality" of primary norms. If the writer falls back on it, it is because he is convinced that legal nature must be conferred on a norm by its having been decided and willed by a definite authority.⁹⁹ Here it is obvious that the much criticized ideas of traditional positivism are taking their revenge. Finally, even Giuliano does not entirely escape the influence of the idea of the "laying down" of all law by some "creative organ." This writer pointed out a while ago that for the more general legal principles of the international order there is no "real process of laying down, of production" and that their legal value does not derive from their "having been laid down by a definite process on which a legal norm has conferred this power."¹⁰⁰ And he also saw the inconsistency of

⁹⁶ La fonte suprema, *op. cit.* 212 f. In order to remain faithful to these ideas, Sperduti, in his latest article, "Norme giuridiche primarie," *loc. cit.* 16, has recourse to a use of the word "source" with which even he does not seem entirely satisfied.

⁹⁷ As we saw, the fact that primary norms belong to the legal system is determined, according to Sperduti, by inference from other norms of the legal system for which they form the necessary premises.

⁹⁸ Diritto internazionale, *op. cit.* 79, 88 f.

⁹⁹ The writer openly states this (*ibid.* 26) when he asserts that the legal norm is only the outward manifestation of the phenomenon of the *authority of social power*. Sperduti, Norme giuridiche primarie, *op. cit.* 16 f., criticizes Quadri's idea of a "will of the social body." But even reduced to a mere metaphor, as Sperduti would like, the idea of a "social will," while serving no useful purpose, could be the cause of misunderstanding.

¹⁰⁰ M. Giuliano, "Considerazioni sulla costruzione dell'ordinamento internazionale," in *Comunicazioni e studi dell'Istituto di diritto internazionale e straniero dell'Università di Milano*, Vol. II, p. 201 (Milan, 1946).

discriminating, as some would have liked to do, between those supreme principles and the rest of general customary law. And yet despite this, Giuliano then yields to the temptation of attributing a source, even though not legally anticipated, to those principles and to those customary norms. In order to do this he tries to present as a source, as a creative organ of international norms, the "consciences of the members of the whole international community"; or a "manifestation" of them; or again the international community itself, seen as a whole, as an organ of a general character which "formulates judgments of legal value," as opposed to the productive organs in which norms are formulated by only some of their members; or, finally, "the direct and immediate formulation of judgments of legal value by the community as a whole."¹⁰¹ To imagine an organ of this kind as an organ which can produce law is, once more, nothing but a fiction, as dangerous as all fictions. At the same time it is of no use to legal science, like all other attempts to return to imaginary non-legal sources. Furthermore, it is a conviction that contradicts the idea which the same writer has expressed: that the general norms of the international legal order are the "opinions," the "legal convictions" of the international community taken as a whole:¹⁰² someone who is convinced of something does not create or produce his own conviction, he simply has it. The fact that, in spite of this, Giuliano felt the need for this fiction proves that his rejection of the traditional idea of positivity is less fundamental than it might appear, and that the idea that the essence of positivity cannot altogether be detached from a creation of law by a definite productive organ, from its being "laid down" by a body—though this body may be society—still continues to influence him. It is bound up with the whole conception of law as "having been" produced by society, and linked to the premise—which cannot be eliminated when one identifies "positivity" with "sociality" as Giuliano does—of the necessarily "positive" nature of all existing legal norms. And so this idea prevents that writer from taking the final step, from recognizing unhesitatingly that there are norms, existing and in force,

¹⁰¹ See, respectively, *La comunità internazionale*, *op. cit.* 162, 166, 174, 181, 226, 229. Similarly, in connection with "general principles of law recognized by civilized nations," Giuliano specifies as their "technical sources" "these same human societies organized as States."

¹⁰² Already in *Scienza giuridica* 81, this writer had occasion to point out that a reference to the conscience of the members of the social body can only be legitimate if this conscience is considered not as a "source" but as the "seat" of the norms, the place in which they are born, live and die, where they are written ideally even though they are norms of "*jus non scriptum*"; on condition, that is, that the reflexive meaning of "conscience" is not confused with the active meaning of "creation" or "approval." It is obvious that one can speak of the "spontaneity" of the formation of certain norms only if one sets aside any idea of their being produced or formulated, either by this society as a whole, or by the conscience of its members. Spontaneous formation, production and formulation are words which naturally exclude each other. Giuliano particularly stressed the fact that the "formation or rejection of general international norms" is a "spontaneous and natural phenomenon," in his most recent book: *I diritti e gli obblighi degli Stati. Tomo primo: L'ambiente dell'attività degli Stati*, in *Trattato di diritto internazionale* (dir. da G. Balladore Pallieri, G. Morelli, R. Quadri, sez. prima, Vol. III, Padua, 1956), p. 39.

which differ from the others, not because they were produced by a source different from and superior to the law rather than anticipated by it, but because they are norms which have no "source" of any kind, which grew up in the conscience of the members of society without having been "produced" or "formulated" by any body, and whose nature can only be recognized in its different aspects when this fact has been realized.

It must be said that that part of modern international legal thought which likes to assert, often quite rightly, the "sociality" of law, is in danger, though to a different degree according to different authors, because it has not entirely rejected the idea of legality left behind by positivism. This is the danger of falling into a different, but not dissimilar, error from that of the statalist positivism, which it has often effectively opposed. It is not enough, after having proved that a definition of law as the will of the state or as all the laws created by the state, is wrong, simply to substitute for state a society more or less artificially personified. One must recognize that legality is not a quality conferred on norms because they were laid down by a given body, whichever that may be. What is of real value in the statement of the sociality of law is that law, as a social phenomenon—and "phenomenon" does not mean "product"—is manifested and operates in the life of society and that therefore one must look for it in society, and consider and understand it in relation to society and its needs. But this does not mean that "sociality" is the reason for "legal nature," that law is law because it is "created" by society, or because it is "the will of the social body" even in a metaphorical sense. One cannot say that society confers legality on its own norms¹⁰³ or, even if these norms are legal, that it is because society and its members want and consider them as such.¹⁰⁴ Legality is an attribute conferred, not by society or by any

¹⁰³ The fact that "social forces" cause its legal system to operate in society does not justify the inference that "it is society which confers legality on its system of legal organization," as Sperduti states, *Norme giuridiche primarie*, *op. cit.* 27. Whatever the idea which the author intended to express by this statement, this last idea certainly lends itself to ambiguity. To indulge, as he does, in such statements as "it is society which creates law" (p. 30), or in the use of the metaphor of law as an emanation of the will of the social body, confirms the reality of the danger just mentioned, as do some of Giuliano's expressions recalled above, and some of Quadri's, which go even further.

¹⁰⁴ In his *Considerazioni sulla costruzione dell'ord. int.*, *op. cit.* 186, Giuliano had described legality as a force given to certain norms by the "conviction of the members." A reference to this subjective and "ideological" element was therefore enough to permit a distinction to be made between legal norms and other social norms. It would seem that this idea has been abandoned by the author in the second part of his next study, *La Comunità internazionale*, *op. cit.* 222 f., where one finds him accepting the idea that what makes the legal system different from other systems of social norms lies "only in the speciality of the values, or—if you prefer—the meanings, which legal judgments attribute to the social behaviour in question." To say this is to admit that these judgments are characterized as judgments because of an objective element inherent in them, and not because of a merely subjective conviction of the members of the social body. However, some doubt still remains as to whether Giuliano has in fact abandoned the first idea, since he seems to restate it more recently in *Norma giuridica, diritto soggettivo e obbligo giuridico* (Pubbl. della Fac. di giur. dell'Univ. di Modena, No. 84, 1952), p. 21, note 3.

other real or fictitious creating body, but by human thought which reflects on social phenomena; it is an attribute which is reserved for a certain category of norms, for a given group of judgments which it meets in social life, because they, and they alone, are found to possess as a whole definite objective characteristics. In other words it is legal science which, by discovering these characteristics and observing how they differ from those of other categories of judgments, which are also social, and present, and operating in the life of society, picks out the category of judgments in which it finds these characteristics and qualifies it as legal. The reason for their legality and their being qualified as norms of law lies in the objective presence of these characteristics, which legal norms reveal in their structure and in their common functioning: not in an imaginary "laying down" or "creation" or "formulation" by "society."

9. The discussion contained in the preceding pages should have provided convincing proof of the fact that legal science—and the international branch particularly—must make a further effort now to free itself finally from the last remnants of legal positivism which are preventing it from making and consolidating conquests indispensable for the future development of scientific investigation.

With the intention of isolating the sphere of law and distinguishing it from that of other orders of knowledge which was its great merit, and with the ambition of making only that which really can be called law the object of legal science, separating it clearly from everything that is only aspiration, subjective expression of ideal needs of justice, or no less subjective deductions from principles which are said to be rationalistic, legal positivism made one mistake: that of following an *a priori* concept of law which led it to be too restrictive in tracing the boundary line. And so only "*jus positum*" remained in the field of law—and sometimes not even that—while all law which, because it had not been *positum* and had been easily confused with non-legal elements in the past, but is still no less law than law which has been "laid down," and contains all the essential norms of every legal system, without which even law which had been "laid down" would not be law, was excluded from it. Ross has correctly observed how this idea, that there must be no other law besides that which has been positively formulated, has provoked and partly justified modern reactions in favor of natural law against positivist theories.¹⁰⁵ However, if these reactions have been well received in their criticism of positivism because of its mistake, there is no need to lose sight once more of something that had been usefully specified, to confuse law with non-law, thus making

¹⁰⁵ A. Ross, *A Textbook of International Law* 95 (London, 1947): "As will appear from the above, there is undoubtedly something right in this reaction. There are sources of law other than those positively formulated. Insofar one must agree with the naturalist theories." "But this does not mean," the writer adds straight away, "that there are also 'natural' (supersensual, *a priori*) sources of law, but merely expresses the socio-psychological reality that judicial decisions, as described above, are also determined by spontaneous free factors of many kinds." He points out that ambiguity of the term "positivism," which can be defined either as "what is based on experience" or as "what is formally established."

legal science take a step backwards instead of forwards in order to correct this mistake. On the contrary one must complete the view of the legal phenomenon by bringing back into the field of law the part that had been arbitrarily separated from it and consigned to a vague kind of limbo.

This return to the field of law of the part which seems to be the product of spontaneous germination and not of will or of a "laying down," must be carried out with the full knowledge that this law, although differently expressed, actually appears no less clearly and really existing and operating than that which was laid down by special productive organs,¹⁰⁶ and that it is therefore perfectly capable of being specified and known by legal science which is not a science for nothing.

However, as this writer has had occasion to say several times, in order for this full acceptance of the reality and legality of spontaneous law to be reached, it is absolutely essential to overcome the false idea, which gained ground owing to legal positivism, that legality is a kind of mark stamped on certain norms because they come from certain sources, because they were created by a given body whatever body that may have been. It is essential to recognize that legality is a qualification which legal science attributes to definite opinions, to given norms according to certain specific characteristics of their functioning in social life, and not because these opinions and these norms are propositions desired by certain bodies or produced by certain processes. Having recognized this, it is therefore a question of applying to that part of law which we have called spontaneous methods which correspond to its specific nature, and not to employ means which at best can only be used for law which has been laid down by special law-creating organs, or to hold that this law cannot be recognized by legal science only because these same limited methods cannot be applied to it. This law must be recognized for what it is: as a law which was formed spontaneously, following various causes and motives which have nothing to do with a formal process of production. There is no need to construct imaginary productive facts for it which are supposed to have "laid it down" wholly or partially, and then to go on perhaps to find a "foundation" for these productive facts in extrajudicial premises always with the illusion of making it still stronger. Again, one should recognize the real proportions of this law without reducing them arbitrarily as if faced with a worrying anomaly; one should specify the characteristics which effectively

¹⁰⁶ L'Esposito, *Il controllo giurisdizionale*, *op. cit.* 3, declares "that in every order beside the legal rules, formed within predetermined ways and limits, there exist rules which are also valid and efficient that arose outside legal channels." For A. P. d'Entrèves (*Natural Law, An Introduction to Legal Philosophy* 67 (London, 1951)) "Positive law does not exhaust the whole range of legal experience. There may be laws other than the commands of the sovereign, laws with a different structure yet nevertheless binding and formally perfect." And he quotes as an example the "laws of the international community."

According to Barile, *La rilevazione*, *op. cit.* 155, "International unwritten law of the present day could be called 'law in force' if this ambiguous phrase were understood, not in the sense that this law is not an historical fact, but that it has force in its existence as a purely legal phenomenon directly linked with the whole of historical reality and not bound by formally set rules."

distinguish it from law "produced" by law-creating organs, and draw from the existence of these characteristics all the important conclusions to which they lead. Finally, from the return of that part of law which had been arbitrarily excluded from the sphere of law, one should take the corollaries deriving from it which refer to the different problems or pseudo-problems of legal thought in general, and of international law in particular. In fact, the writer has already had occasion to draw attention to the fact that spontaneously formed law, present and essential in every legal order, takes on much greater importance in the international order, since, because of the equalizing structure of international society, all common international law is exclusively law of this nature.¹⁰⁷

The final detachment of the idea of legality from that of a "laying down" seems to be the indispensable premise for the accomplishment on the part of legal thought, and particularly international thought—which for some time has not unreasonably assumed the task of leading the reaction against the arbitrary restriction of the sphere of law made by positivism—of the above-mentioned developments. It is also necessary for the happy conclusion, on the basis of these, of the efforts to which legal thought has been directing its energies for some time. There remains the question whether these developments, and the premise on which they depend, can actually and definitely be achieved while there is ambiguity, which has become progressively worse, concerning the meaning and value of the word "positivity." In the preceding pages we have been able to see at least some of the harmful consequences of this ambiguity. In particular, we have been able to realize how the two or more meanings of the term "positive law" constitute a serious obstacle to the determination of the very character of legality. The elimination of this ambiguity is therefore also an essential condition: more essential than we are usually prepared to think when it is a question of language.

The ways of reaching a clarification of this problem can be various. This writer is perfectly aware that the method he prefers of keeping to the use corresponding to its etymology and recognized by the longest tradition for a definition of "positive" is not the only theoretically possible or permissible one. From the beginning the writer has said that for "positive law," as for every other expression used in speech, there does not

¹⁰⁷ *Scienza giuridica*, *op. cit.* 107 f. See also Giuliano, *La Comunità internazionale*, *op. cit.* 228 f.; and I Diritti e gli obblighi, *op. cit.* Barile is concerned with an examination of some important consequences concerning problems of international law, which can be deduced from recognizing the "spontaneity" of common international law. Barile, *La rilevazione e l'integrazione*, *op. cit.* 144 ff., 162 ff., 191 ff., and "Interpretazione del giudice e interpretazione di parte del diritto internazionale non scritto," in *Riv. di dir. internazionale*, 1954, fasc. 2-3, p. 168 f. See also Benvoglio, *Interpretazione*, *op. cit.* 247 ff. But there are certainly numerous and vast fields in which useful results may be obtained from a correct view of the characteristics of general international law as those of a spontaneously formed law. Note should be taken of the recent agreement of Sperduti, *Norme giuridiche primarie*, *op. cit.* 19 f., on some corollaries established for this recognition, particularly concerning the final elimination of the so-called problem of the "foundation" of law, especially that of international law.

exist a "true" or a "false" meaning, so that one must be adopted and the other repudiated. The only really indispensable thing is to see that the recognized use is as defined and unequivocal as possible not only in the scientific language of each writer, but also within legal thought in general and the international branch in particular.

However, there is nothing to prevent one, on principle, from severing all links with etymology and tradition, and using the term "positive law" as a synonym for "law in force," that is, as indicating all that law which experience reveals as having been historically accomplished, and making an effective part of one of those legal systems which live within the various existing human societies.¹⁰⁸ If this way were followed it would obviously be permissible, and even necessary, to conclude that even legal norms which had been formed spontaneously, rather than through the action of special creative organs, and revealed by a convincing variety of outward manifestations to be existing and operating in a determined society, and as belonging to its legal system, were also norms of "positive law." But in this case it would be necessary, on the other hand, to exclude most strictly the use of the same term "positive law" to indicate, within existing law, law which had really been "laid down" and produced by given law-creating legal organs, and another adequate and unambiguous term would have to be found to indicate this law. Above all one must not give in to the idea of seeking a "laying down" of law which was not "laid down" merely because it is qualified as positive, or to all those other ideas which are consequences caused by the contemporaneous attribution, consciously or unconsciously, of a variety of different meanings to the same word. And however much one is warned, this certainly is not easy. In fact we have been able to see how difficult it is, even for those authors who propose to do so, to free oneself entirely from the influence of a use which has been universally accepted for so long and which has, furthermore, the attraction of an etymological derivation in its favor. If it is eliminated on one side, it almost inevitably blossoms out on the other, often in the less apparent but certainly no less important guise of its consequences. And the idea of looking for the "source," the body, and the creative organ, even for that law which really arose independently of any source, continues to be a subject for serious study on the part of legal thought.

For this reason it seems that, in order to attain the necessary clarity of language, other ways must be preferred to that already suspect way of changing the traditional meaning of the terms employed. If one preferred one could entirely eliminate the use of the adjective "positive" and divide "law in force" into norms of spontaneous formation and those produced by legal law-creating organs. Or else, if it was felt to be wrong to give up this ancient and widely accepted term, the most correct and simple way would be to go back to traditional terminology and speak of "positive

¹⁰⁸ Sperduti has expressly shown his preference for this solution in the end, *Norme giuridiche primarie*, *op. cit.* 29 f. The analysis of legal thought which is carried out in the preceding pages could perhaps persuade this writer that his way of understanding "positive law" does not in fact correspond with "that which has always, or generally, been understood."

law" only in the sense of "*jus positum*," to point out clearly that there exists a distinct difference between the ideas of "positive law" and "law in force," and to bring within the larger field of the latter the distinction between "spontaneous law" and "positive law."¹⁰⁹

However that may be, it is obvious that the adoption of one or other solution by linguistic use is not an end in itself; it is only a necessary measure to eliminate ambiguity in language itself and to obtain more easily those conditions which indeed are indispensable to anticipated developments in the scientific investigation of the legal phenomenon, and in particular the international one.

The essential thing is, as emphasized above, that the idea of legality should be detached from that of "laying down": that when it has to be ascertained whether a norm is legal and in force, it should no longer be held that it is indispensable—and sufficient—to find a "source" for that norm, to determine a body which has laid it down through some procedure; that we should be finally freed from the conviction that, in this sense at least, all law in force must necessarily be "positive."

Let it be clear that such an indispensable step implies nothing that could worry anyone. Once having taken it, we should certainly not go on the road back to positions we have already passed. Rather, the explicit recognition of the fact that a part of law in force is law of spontaneous "formation" constitutes just that indispensable correction, that perfecting of legal positivism, which can serve to eliminate attempts at a return to natural law and allow for the further evolution of legal thought in an entirely and purely scientific direction. It can never be repeated enough that law of spontaneous formation is no less really existing, nor less certain, nor less valid, nor less observed, nor less effectively guaranteed than that laid down by specific law-creating organs. It is rather the very spontaneity of its origin that is the reason for a more spontaneous, and therefore a more real, observance.

By recognizing that not all law in force, and therefore not all "international" law in force, is law laid down by special law-creating facts, and even that the most important part of that order is not, therefore, of positive but of spontaneous formation, the science of international law is in

¹⁰⁹ This solution, which the writer prefers, has also been followed in the most recent Italian international thought by Barile, *La rilevazione*, *op. cit.* 146, note 8. According to him, "The expression 'positive' law . . . indicates that part of the law in force which having been formally laid down by a social will, whether by that of a dominant group or the will of the parties in a convention, can be in contrast with non-positive law, because of its content, but was formed spontaneously in the conscience of the members of a given organization." Elsewhere (*Interpretazione del giudice*, *op. cit.* 168 ff.) the same writer often uses the expression "formally laid down law" as a synonym of "positive law" and the opposite of "spontaneous law." This expression is correct and legitimate in itself. The only danger is that it may suggest the idea—which we have seen willingly played with by others—of the existence alongside law "formally laid down" of a law which has not been "formally laid down" with the natural consequence that we are presented with "layings down" and "sources" which are not formal, not legally anticipated. These are in fact ideas which have no place in legal science, and a return to them is contrary to the clarification which we are seeking.

no danger of seeing the value and importance of its object of study diminish, or of furnishing an argument for the very superficial charges of non-legality or imperfection which are sometimes hurriedly made against the international legal phenomenon by followers of other disciplines. On the contrary, by aiming at this indispensable clarification, the science of international law can render a very great service to these other disciplines, by helping them to lay the foundations of a better understanding of the legal phenomena which they study. Where Italian international thought is concerned, the above-mentioned recognition, far from representing a break with or a deviation from the very united line of its development, only constitutes a logical and natural development, and a necessary premise for the further progress of that thought, so rich in important contributions, which started about forty years ago.

RESEARCH ON THE GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS.*

OUTLINE OF A NEW PROJECT

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Among students of international law it is no secret that the concrete determination and formulation of the general principles of law recognized by civilized nations is a task hardly begun. This paper is intended to show that the task is important, perhaps more important than any other to which the collective wisdom and experience of scholars trained in comparative law can be devoted, and that the colossal magnitude of the task should not discourage us from making a beginning. It further aims to call attention to a specific project now under way which is designed to constitute a systematic beginning, or at least to determine the feasibility of the attempt.¹

I

Article 38 of the Statute of the International Court of Justice provides, in its clause 1(c), that the Court applies "the general principles of law recognized by civilized nations." In that Court and in other international tribunals, the general principles of law recognized by civilized nations constitute one of the sources of international law. In countless cases, international courts have referred to this source of international law, and have invoked the general principles as a basis for their decisions.² But if we read the opinions, we look in vain for an answer to the question: How did the Court know that the particular rule or principle it relied on was in fact a general principle of law recognized by civilized nations? In case after case, the judge writing the opinion simply expressed a hunch, a hunch probably based upon the legal system or systems with which he happened to be familiar. As Dr. Schwarzenberger emphasizes in his foreword to

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¹ For some references to earlier efforts to formulate certain "general principles," especially in the area of human rights, see below, pp. 750-751.

² The cases have been collected by Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), *passim*. See also Lauterpacht, *The Function of Law in the International Community* 115 ff. (1933); *idem*, *Private Law Sources and Analogies in International Law* §§ 28, 29 (1927); Verdross, "Les Principes Généraux du Droit dans la Jurisprudence Internationale," 52 *Hague Recueil* 191 (1935), especially at 230 ff.

Dr. Cheng's useful monograph on Article 38, it is *not* the fault of the judges that they have to resort to such an unscientific method.³ Nor is it the fault of those teaching and practicing international law. It is the comparatists, Dr. Schwarzenberger points out, who thus far have failed to give any concrete answers, based on comparative research, to the question: What *are* the general principles of law which are recognized by civilized nations?⁴ As long as concrete answers to this question are lacking, there is necessarily a gap in the structure of public international law, a gap which can be filled only by those who have learning and experience in what is commonly called comparative law.⁵ As comparatists, we are thus called upon to make a major contribution to the development of international law. The potential magnitude of this contribution has been emphasized by teachers and practitioners of international law, who point out that the "general principles" mentioned in Article 38, if they can be concretely established, are a primary source, often the only source of international law in the absence of an applicable treaty.⁶ /

Even if there is a treaty, its interpretation may require the application of general principles of law recognized by civilized nations.⁷ This is particularly true of the numerous treaties which employ broad language such as "freedom of access to the courts" or "most constant protection and security for their persons and property." As an example, the Peace Treaties of February 10, 1947, may be cited. They include provisions obligating the governments of Italy, Bulgaria, Rumania and Hungary)

³ Cheng, *op. cit.*, Foreword by Schwarzenberger at XII.

⁴ Other authors have expressed similar views. See Schlesinger, "Teaching Comparative Law: The Reaction of the Customer," 3 A. J. Comp. Law 492, 497-498 (1951); Gutteridge, "Comparative Law and the Law of Nations," 21 Brit. Yr. Bk. Int. Law 1 (1944); Vallindas, "General Principles of Law and the Hierarchy of the Sources of International Law," in *Grundprobleme des Internationalen Rechts: Festschrift für Jean Spiropoulos* 425 at 428 (1957); Wehle, "Comparative Law's Proper Task for the International Court," 99 U. of Pa. Law Rev. 13 (1950).

⁵ For an example which, although limited to a single point, shows what could be achieved by proper use of the comparative method, see Aréchaga, "Treaty Stipulations in Favor of Third States," 50 A.J.I.L. 338, 346-349 (1956).

⁶ See Briggs, *The Law of Nations* 45 ff. (1952); Haerle, "Les Principes Généraux de Droit et le Droit des Gens," 16 Rev. de Droit International et de Législation Comparée 663 (1935); Kraus, "Revision of the Peace Treaties ex aequo et bono," 1 New Commonwealth Quarterly 33, 42 (1935); Verdross, *loc. cit.* (note 2 above), at 191; Visscher, "Contribution à l'Étude des Sources du Droit International," 3 Recueil Gény 397 (1936).

With special reference to the present Suez Canal dispute, and the waters of the Indus Basin, see Laylin, "Principles of Law Governing the Uses of International Rivers," especially at pp. 13-14 of the advance print; Finch, "Navigation and Use of the Suez Canal" (both addresses before the 1957 Annual Meeting of the American Society of International Law, printed in the PROCEEDINGS of that meeting); Huang, "Some International and Legal Aspects of the Suez Canal Question," 51 A.J.I.L. 277, 296, 307 (1957).

⁷ See Makowski, "L'Organisation Actuelle de l'Arbitrage International," 36 Hague Recueil 360-361 (1931); Mann, "Interpretation of Uniform Statutes," 62 Law Quarterly Rev. 278 (1946); Salvioli, "La Corte Permanente di Giustizia Internazionale," 15 Riv. di Dir. Int. 11 (1923); Vallindas, "Autonomy of International Uniform Law," 8 Rev. Hellénique de Droit Int. 8, 10 (1955).

to secure to all persons under their jurisdiction . . . the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting.⁸

It is clear that in many situations these broad terms acquire concrete meaning only by reading into them the general standards of decency which civilized nations recognize in their municipal legal systems, and sometimes in collective declarations.⁹

The importance of the "general principles" in litigation before international tribunals is not limited to the area of substantive law. Many questions of procedure and evidence (often crucial questions, as shown by the examples cited in the footnote), which necessarily arise in treaty and non-treaty cases alike, are not regulated by specific provisions of treaty or charter; in filling the gap, an international court will expressly or silently resort to procedural and evidentiary principles which are felt to be inherent in all civilized legal systems.¹⁰

⁸ Art. 15 of the Peace Treaty with Italy, 61 Stat. 1378; Art. 3 (1) of the Peace Treaty with Rumania, 61 Stat. 1801; Art. 2 of the Peace Treaty with Bulgaria, 61 Stat. 1955; Art. 2 (1) of the Peace Treaty with Hungary, 61 Stat. 2112.

⁹ See notes 50-54 below.

¹⁰ This was clearly and sweepingly recognized in *The German Interests Case*, 1925, Ser. A-6 Judgments and Orders of the P.C.I.J. 19. Many cases in which this doctrine was applied in connection with particular procedural problems are listed by Cheng, *op. cit.* (note 2 above), at 25, 26, 257-386, 387-390. *E.g.*:

Audiat et altera pars: Arakas (The Georgios) Case (1927), Greco-Bulgarian Mix. Arb. Trib., 7 Rec. des Décisions des Trib. Arb. Mixtes Institués par les Traités de Paix 39, at 43-45;

Nemo Jūdex in sua propria causa: Arakas case, above; Turnbull, Manoa Co. Ltd., Orinoco Co. Ltd. Cases (1903), U. S.-Venezuelan Mix. Cl. Comm., Ralston and Doyle, Venezuelan Arbitrations of 1903, etc. 200 at 244 (1904);

Jurisdiction: Mavrommatis Palestine Concession Case (1924), Dissenting Opinion by Moore, Ser. A-2 Judgments and Orders of the P.C.I.J. 57-60.

The Court has the Power to Determine the Extent of its own Jurisdiction: Interpretation of the Greco-Turkish Agreement (1928), Series B-16 Advisory Opinions of the P.C.I.J. 20; Rio Grande Case (1923), Nielsen, American and British Claims Arbitrations under the Special Agreement concluded between the U. S. and Great Britain, Aug. 18, 1910, 332, at 342 (1926).

Jura Novit Curia: Free Zones Case, (Jgt) (1932), Series A/B-46 Judgments, Orders and Advisory Opinions of the P.C.I.J. 138; Brazilian Loans Case (1929), Series A-20/21 Judgments and Orders of the P.C.I.J. 124.

Presumption of the validity of acts: Valentiner Case (1903), German-Venezuelan Mix. Cl. Comm., Ralston and Doyle, Venezuelan Arbitrations of 1903 etc. 562, at 564 (1904); Friedrich & Co. Case (1902), French-Venezuelan Mix. Cl. Comm., Ralston and Doyle, Report of French-Venezuelan Mixed Claims Commission of 1902, 31, at 42 (1906).

Presumption of the good faith of litigants: Lighthouses Case (1934), separate opinion of Sefériades, Series A/B-62 Judgments, Orders and Advisory Opinions of the P.C.I.J. 47.

Evidence: Kling Case (1930), Opinions of Commissioners under the Convention concluded Sept. 8, 1923 as extended by subsequent Conventions between the U. S. and Mexico, Oct. 1930 to July 1931, 36, at 45 (1931).

Evaluation of Evidence: Odell Case (1931), Further Decisions and Opinions of the Commissioners in Accordance with the Conventions of Nov. 19, 1926 and Dec. 5, 1930

The significance of the general principles is further heightened by the rapid growth in our time of the number and importance of international organizations and of other trans-national and often supra-national bodies and arrangements.¹¹ In creating and administering these institutions, lawyers have to play a vital rôle. International organizations cannot perform their functions without entering into legal transactions which may range from matters of headline importance to the construction of an office building or the purchase of a typewriter. All of these transactions may lead to legal disputes. Legal controversies have arisen, for example, between such organizations and their staff members.¹² Clearly, an international or supra-national organization will not ordinarily subject itself to local law for the determination of such disputes. (The general counsel of every international or supra-national organization will testify that what is needed to resolve these very practical problems is the guidance of a non-local body of law, which very often is non-existent except for the "general principles.") Concrete knowledge of these principles is required, and at present badly lacking, not only for the resolution of disputes, but perhaps even more in order to avoid them by proper drafting of the treaties, charters, agreements and other documents by which these institutions are created and operated.

The more drastic the powers of the organization, the more vital these questions become for the organization itself, for the participating governments and, last but not least, for the individuals and companies affected. The European Coal and Steel Community may be cited as an example. Proper definition of the drastic powers of the High Authority, and creation of a system of judicial review protecting the individual enterprise against abusive exercise of that power, were necessary prerequisites for

between Great Britain and the United Mexican States, subsequent to Feb. 15, 1930, 61 at 62-63 (1933).

Presumptions in Evidence: Daniel Dillon Case (1928), Mexican-U. S. Gen. Cl. Comm., Opinions of Commissioners under the Convention concluded Sept. 8, 1923 as extended by the Convention signed Aug. 16, 1927 between the U. S. and Mexico, Sept. 26, 1928 to May 17, 1929, 61, at 65 (1929).

Burden of Proof on the Claimant: The Queen Case (1872), 2 La Pradelle and Politis, Recueil des Arbitrages Internationaux 706, at 708 (1932).

Res Judicata: Chorzow Factory Case (Interpretation) (1927) Series A-13 Judgment; and Orders of the P.C.I.J. 27.

Prescription: Gentini Case, Italian-Venezuelan Mix. Cl. Comm. (1903), Ralston and Doyle, Venezuelan Arbitrations of 1903 etc. 720, at 726-727 (1904).

But *cf.* for a more skeptical view, Sereni, *Principi Generali di Diritto e Processo Internazionale* (1955), reviewed by Lipstein, 31 Brit. Yr. Bk. Int. Law 522 (1954).

¹¹ See Jessup, *Transnational Law* 9, 29-34, 98-102 (1956). For a general discussion of the growing coverage of international law in our day see, *e.g.*, Kunz, "The Changing Law of Nations," 51 A.J.I.L. 77 (1957); Friedmann, "Some Impacts of Social Organization on International Law," 50 A.J.I.L. 475, 476 (1956).

¹² See Jessup, *op. cit.* 101-102; Bastid, "De Quelques Problèmes Juridiques posés par le Développement des Organisations Internationales," in *Grundprobleme (op. cit. note 4 above)*, pp. 35-37, 39-40; Powers, "United Nations Administrative Tribunals as Adjudicators of Disputes Arising out of Employment Contracts with International Organizations," 54 Mich. Law Rev. 533 (1956).

the proper functioning of the Community.¹³ The lawyers who had to meet those problems had no international or trans-national model to guide them. They had to fall back on the principles of administrative law developed by individual nations. While using French administrative law as their starting point, they did not neglect to examine the administrative law of Germany and of the other participating nations; on this basis they were able to develop a supra-national system of administrative law, which, at least in its broad outline, is consistent with the fundamentals of administrative law recognized in all of the participating countries.¹⁴ They were, of course, helped by the fact that all of the six countries in question have a basically similar system of administrative courts dealing with questions of "public law," separate from the ordinary courts which determine "private law" cases. To establish common ground in an organization comprising both civil law and common law jurisdictions may be even more difficult; but the problem is by no means insoluble.¹⁵

Would it be unreasonable to expect that co-operative supra-national and trans-national ventures, whether regional or worldwide, would be furthered by the availability of a body of formulated general principles of law recognized by civilized nations? May we not assume that the existence of such a common core of legal precepts (and perhaps of legal techniques and institutions) in fields such as those of procedure and contracts would make it unnecessary for the lawyers in each instance to start *de novo* when they set up the ground rules? If the answer to these questions is in the affirmative, then the task before us transcends the area of public international law which we normally associate with Article 38, and assumes significance throughout the vast and rapidly increasing field of trans-national legal relations, whether or not such relations be governed by public international law in the traditional sense of the word.¹⁶

Nor is the impact of the idea behind Article 38 necessarily limited to relations and disputes of a justiciable character. Of course, if a dispute cannot be brought before an international court, Article 38 by its terms is not directly applicable. But the force of the principle which the article announces may assert itself in other ways. The International Commission

¹³ For a description of the organization and functioning of the Community see, e.g., Bebr, "European Coal and Steel Community: A Political and Legal Innovation," 63 Yale Law J. 1 (1953); Parker, "The Schuman Plan," 6 Int. Org. 381 (1952); Van Raalte, "The Treaty Constituting the European Coal and Steel Community," 1 Int. and Comp. Law Q. 73 (1952); Vernon, "Schuman Plan—Sovereign Powers of the European Coal and Steel Community," 47 A.J.I.L. 183 (1953). For a discussion of the first case brought to the Community's High Court of Justice see Note, "European Coal and Steel Community: High Court of Justice," 4 Int. and Comp. Law Q. 146 (1955).

¹⁴ See, e.g., Bebr, "Protection of Private Interests under the European Coal and Steel Community," 42 Va. Law Rev. 879 (1956); Stein, "The European Coal and Steel Community: The Beginning of its Judicial Process," 55 Col. Law Rev. 985 (1955).

¹⁵ Cf. Hamel, "Perspectives et Limites de l'Unification de Droit Privé," in International Institute for the Unification of Private Law, Actes du Congrès International de Droit Privé tenu à Rome en Juillet 1950, pp. 61, 74-75 (1951).

¹⁶ The significance of the concept of "general principles of law recognized by civilized nations" is not even limited to trans-national transactions and relations. See Part II of this article below.

of Jurists,¹⁷ in dealing with the Hungarian situation, recently expressed the thought

that an appeal to the laws and basic principles of justice which are recognized by all civilized nations may carry weight where political arguments fail.¹⁸

If we take the long view, this optimistic prediction may be true; but the general principles of law recognized by civilized nations can be translated into the pressure of world opinion only if, as a first step, some agreement can be reached as to just what these principles are.

II

If it were possible to find and formulate a core of legal ideas which are common to all civilized legal systems, the effect might transcend the area of international law (however broadly defined) and of international organizations, and might go far beyond the goal—even though in itself it is an ambitious goal—of implementing Article 38 of the Statute. Tentatively, and subject to verification by the research methods outlined at the end of this paper, it is suggested that establishment of such a common core might lead to practical results in a number of areas of legal endeavor.

1. The history of legal systems in the last 800 years has been one of increasing regionalism and sectionalism.¹⁹ The common law and the civil law became two worlds apart. Within the civil law world, the codification movement of the last 150 years resulted in national isolationism and separatism.²⁰ Each nation created its own national codes. Judges,

¹⁷ The International Commission of Jurists of The Hague should not be confused with another Commission of the same name established in 1955 by the International Association of Democratic Lawyers. See Kabes and Sergot, *Blueprint of Deception* 270 (1957).

¹⁸ Editorial entitled "Hungary," in the Newsletter of the International Commission of Jurists, I (April, 1957), p. 3.

¹⁹ It is, of course, true that even in medieval times the law was not uniform throughout the world. But the universality of feudal culture and of ecclesiastic influence, the pervasive impact of the renaissance of Roman law in Italian universities, and the cosmopolitan nature of mercantile customs combined to give the law a fundament common to all Christendom. Later on, these unifying forces were neutralized and overcome by the decay of feudalism; by the Reformation; by the gradual emergence of national consciousness and national states; by the rise of the English common law, which reduced the influence of civil and ecclesiastical law in England and absorbed the law merchant; and finally, by the sweeping 19th-century victory of nationalism as a mass movement, which in its wake brought national codifications to the countries of the civil law orbit.

²⁰ *Within* each of the nation states, codification meant unification of diverse local laws. See, e.g., Déak and Rheinstein, "The Development of French and German Law," 24 Georgetown Law J. 551 (1936). But *as between* one nation state and another, the national codifications had the effect of impeding the interchange of legal thought and experience. See Schnitzer, *De la Diversité et de l'Unification du Droit* 8-9 (1946); Schlesinger, "Teaching Comparative Law: The Reaction of the Customer," 3 A. J. Comp. Law 492, 501 (1954). Cf. David, "Die Zukunft der Europäischen Rechtsordnungen: Vereinheitlichung oder Harmonisierung?" in *Europäische Zusammenarbeit im Rechtswesen*, hsgb. von K. Zweigert, pp. 1-4 (1955).

practitioners and academicians in each country concentrated their efforts on the interpretation and development of their own code system, without paying much attention to the similarly isolated developments in other countries living under different codes. Linguistic, terminological and conceptual barriers between the lawyers of various countries thus were bound to grow to new heights.²¹

This development engulfed all fields of law, including even the area of commercial law in which the law merchant had provided a cosmopolitan spirit and a measure of worldwide uniformity until the 18th century.²² Within the common law world, the decay of uniformity did not proceed at the same pace as in the world of code law;²³ but with the increasing importance of statutory law, even in the so-called common law jurisdictions, the trend is in the direction of growing divergence.²⁴

Far-sighted scholars and practitioners, watching this dangerous rise of sectionalism in the law, have long called for unification (perhaps we should say reunification), especially in the area of commercial law.²⁵ This movement, supported by the efforts of the best among the world's legal scholars, met with some success, on a regional scale, in the law of bills and notes,²⁶

²¹ See Schlesinger, *Comparative Law—Cases and Materials* 18–19 (1950); Schnitzer, *op. cit.* (note 20 above), at 4–12. The particularization of legal systems was mitigated, however, by the prestige gained by a few outstanding Codes which became models of legislation within so-called “code families.” See, e.g., Schlesinger, *op. cit.* at 232; Schnitzer, *op. cit.* at 22–25. (The literature on this point, especially on the expansion and influence of the French Civil Code, is so vast that it would go beyond the scope of this paper to give further citations.)

²² At one time it was even asserted that the law merchant was a branch of the law of nations. See Burdick, “Contributions of the Law Merchant to the Common Law,” in *III Select Essays in Anglo-American Legal History* 34–43 (1909). The writings of some of the scholars who held this view are cited and criticized by Goldschmidt, *Handbuch des Handelsrechts* 364–365 (1874).

²³ This was due, in part, to the defeat of the codification movement in the United States. See Wagner, “Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States,” 2 *St. Louis U. Law J.* 335 (1953).

²⁴ Cf. Lawson, “Uniformity of Laws: A Suggestion,” 26 *J. Comp. Leg.* (3rd Ser.) 16, 17 (1944).

²⁵ See Bagge, “International Unification of Commercial Law,” in *International Institute for the Unification of Private Law, Unification of Law: A General Survey of Work for the Unification of Private Law* 253 ff. (1948); Hamel, “The Geneva Conventions on Negotiable Instruments and Methods of Unifying Private Law,” *ibid.* at 271 ff.; Keyes, “Toward a Single Law Governing the International Sale of Goods,” 42 *Calif. Law Rev.* 653 (1954); Rabel, “The Hague Conference on the Unification of Sales Law,” 1 *A. J. Comp. Law* 58 (1952). On the most recent endeavors in the area of international commercial law (using the term in its civilian sense) see Reese, “Some Observations on the Eighth Session of the Hague Conference on Private International Law,” 5 *A. J. Comp. Law* 611 (1956), and Documents, *ibid.* at 650; see also Riese, “Der Entwurf zur Internationalen Vereinheitlichung des Kaufrechts,” 22 *Zeitschrift f. Ausländisches und Internationales Privatrecht* 16 (1957). Cf. Matteucci, “Prospects of International Unification of Law from a European Viewpoint,” 10 *La. Law Rev.* 15 (1949).

²⁶ See Schlesinger, *Comparative Law* (*op. cit.* note 21) 8; Feller, “The International Unification of Laws Concerning Checks,” 45 *Harvard Law Rev.* 668 (1932); Gutteridge, “The Unification of the Law of Bills of Exchange,” 12 *Brit. Yr. Bk. Int. Law* 13

and even on a worldwide scale in some areas of air law and of maritime law.²⁷ In general, however, experience shows that unification efforts are rarely successful except within narrow specialized sectors in which organized group pressures operate on a trans-national scale. The progress of true worldwide unification of large segments of law has been too slow to leave much room for optimism.²⁸ The time has come, perhaps, to discard or limit the visionary goal of "one law" or "one code" for the whole world, and to substitute for it the more realistic aim of crystallizing a common core of legal principles.²⁹ At the same time, we may pragmatically recognize that outside of that common core the detailed legal rules followed by the various nations necessarily differ, and perhaps should differ.

Businessmen might be immeasurably helped in their international transactions if they could be sure that, in spite of continuing differences of detail, there is trans-national agreement on minimal principles of conduct and enforcement. One might draft contracts and other documents for use in international trade in such a way that, given this minimum area of agreement, they would be effective under more than one legal system. In an article published eight years ago, which has received more attention from practitioners than from academicians, two American scholars attempted to apply this common core method to the drafting of international bills of exchange.³⁰ Once the necessary comparative research has been con-

(1931); Hudson and Feller, "The International Unification of Laws Concerning Bills of Exchange," 44 *Harvard Law Rev.* 333 (1931); Yntema, "Unification of the Laws Respecting Negotiable Instruments," 4 *Int. and Comp. Law Q.* 178 (1951).

²⁷ See, e.g., Schlesinger, *Comparative Law*, *op. cit.* at 7-8; Cleminson, "International Unification of Maritime Law," 23 *J. Comp. Leg. (3rd Ser.)* 163 (1941); Gutteridge, "The Unification of the Law of the Sea," 16 *J. Comp. Leg.* 246 (1934).

²⁸ See Gutteridge, *Comparative Law* 145 ff. (1946), and Schlesinger, *Comparative Law*, at 381-382, 451-452, where some of the difficulties are discussed. See also Patterson and Schlesinger, *Problems of Codification of Commercial Law*, N. Y. Leg. Doc. No. 65 A (1955) (to be published also in the forthcoming study of the New York Law Revision Commission dealing with the proposed Uniform Commercial Code).

²⁹ Compare Sarfatti, "Roman Law and Common Law: Forerunners of a General Unification of Law," 3 *Int. and Comp. Law Q.* 110 (1954):

"That which is worthy of particular consideration today is the aspect of comparative law which has for its object a continuous rapprochement among the principal systems being compared, and which seeks to discover in their apparent diversity a common substratum of institutions and concepts."

See also the article by the same author, "Comparative Law and the Unification of Law," 26 *Tulane Law Rev.* 317 (1952).

Compared to an endeavor to find a "common substratum of institutions and concepts," an attempt to formulate concrete "general principles" seems more ambitious and less certain of success. A retrenchment, however, to the more modest goal advocated by Sarfatti would still be possible if the project outlined in this article should prove the impossibility, at this time, of agreeing on a worthwhile number of sufficiently meaningful "general principles."

For comparable proposals concerning the "harmonization" rather than the "unification" of law, on a regional basis, see David, *loc. cit.* note 20 above, at 7 ff.; also Aubin, "Europaeisches Einheitsrecht oder Intereuropaeische Rechtsharmonie?" *ibid.* at 48 ff.

³⁰ Leary and Husted, "An Approach to Drafting an International Commercial Code and a Modus Operandi under Present Laws," 49 *Col. Law Rev.* 1070 (1949).

ducted, the method could just as fruitfully be applied to the drafting of any other type of legal document used in international trade.

2. To a greater degree than is ordinarily realized, the legal systems of individual nations are receptive to the penetration of general principles recognized by civilized nations, provided these principles can be established in concrete form. This willingness to receive the "general principles" into the national legal order, has found expression in positive norms, both in the civil law and in the common law world.

(a) Constitutional, statutory and decisional rules of many countries provide that established precepts of international law, including those derived from the source known as "general principles," are applicable and binding in domestic courts as part of the domestic legal system.

(b) Many, if not most, of the civil codes enacted in civilian countries contain express provisions concerning the source or sources of law to which a judge should turn if no rule applicable to the case before him can be found in the code or in other statutes.³¹ The Spanish Civil Code, for example, provides in Article 6:

When there is no law exactly applicable to the point in controversy, the customs of the place shall be observed, and in the absence thereof, the general principles of law.³²

Another more recent example is presented by the Egyptian Civil Code of 1949, which served as a model for the codes of several other Arab countries. Article I, paragraph 2, of that code provides as follows:

In default of statutory provisions the Judge shall decide according to custom, in the absence of custom, according to the principles of Islamic law, and in default of such, according to the principles of natural law and equity.

In the many countries whose codes thus refer to "general principles of law" or "principles of natural law and equity," courts and legal writers face an interesting question. In ascertaining the contents of these principles, should they look beyond their national frontiers? Are these principles conceived as having their roots in a local or national *Volksgeist*, or do they transcend national territories? The Egyptian Code, it seems, is quite clear on this point. In referring to the principles of Islamic law, it looks beyond the borders of a single country and invokes the common core of the laws of all Islamic nations.³³ Then, by referring even more

³¹ Various types of such code provisions are noted by Cheng, *op. cit.* 400-408, by Ireland, "Precedents' Place in Latin Law," 40 W. Va. Law Q. 116 (1934), and by Lenthoff, "Interpretative Theories: A Comparative Study of Legislation," 27 Texas Law Rev. 312 (1949). See also Schlesinger, *Comparative Law—Cases and Materials* 276 (1950), where an English translation of the celebrated Art. 1 of the Swiss Civil Code is set forth.

³² For a discussion of this code provision, see Diokno, "What are 'los Principios Generales del Derecho' in Article 6 of the Spanish Civil Code?" 10 Philippine Law J. 1 (1930).

³³ See Habachy, "Islam: Factors of Stability and Change," 54 Col. Law Rev. 710, 713, 716-717 (1954); Khadduri, "Nature and Sources of Islamic Law," 22 Geo. Wash. Law Rev. 3 (1953); Millbt, "L'Idée de la Loi dans l'Islam," 4 Rev. Int. de Droit Comp. 669 (1952).

generally to "the principles of natural law and equity," the Code instructs the courts to go further and study principles the recognition of which is not limited to the Islamic world.

The concrete exposition of the principles of law generally recognized by civilized nations thus might be helpful to municipal tribunals when they attempt to reach positive results on the basis of these broad provisions typically contained in civilian codes.

(c) Even in the absence of a code provision of this type, courts in common law as well as civil law countries (as indeed courts operating under any type of legal system) have to fashion new answers to novel questions. In doing so, they often benefit from foreign experience,³⁴ and, in particular, from studying the "general principles" to which other civilized nations adhere.³⁵ Even more frequently, legislators and legislative draftsmen engage in comparative studies before they choose between alternative techniques and solutions. Might it not be expected that courts and legislators will give preference to one solution over another if it can be demonstrated that such solution is in accordance with principles of law generally recognized by other civilized nations? Might not a statement or "restatement" of the general principles, even if it has only academic authority to back it up, thus become a force toward a modicum of uniformity, or at least of mutual understandability of legal precepts?

(d) In countries in which the courts have the power to examine the constitutionality of legislative acts, awareness of the fundamental common core of all civilized legal systems may play an important rôle in determin-

³⁴ See, e.g., Wolff, "The Utility of Foreign Law to the Practicing Lawyer," 27 Am. Bar Assn. J. 253 (1941); also Schlesinger, *Comparative Law—Cases and Materials* 7 (1950).

³⁵ See, e.g., *McLean v. Clydesdale*, 9 App. Cas. 95, 105 (1883); *Taylor v. Caldwell*, 3 B.&S. 826 (1863); *Embrey v. Owen*, 6 Ex. 353, 371 (1851); *Acton v. Blundell*, 12 M.&W. 324, 353 (1843); *Blundell v. Catterall*, 5 B. & Ald. 278 (1821); *Kennel v. Abbott*, 4 Ves. Jun. 809 (1797); *Coggs v. Bernard*, 2 Ld. Raym. 909 (1703); *Funk v. U. S.*, 54 S. Ct. 212, 216, 290 U. S. 371 (1933); Appendix II to Judge Frank's dissent in *U. S. v. Grunewald*, 233 F. 2d 556 at 587–592 (C.A. 2, 1956), reversed in 353 U. S. 391 (1957); *Bourjois v. Hormida*, 106 F. 2d 174 (C.A. 2, 1939); *Associated Press v. K.V.O.S.*, 9 F. Supp. 279 (D. C., W. D. Wash. 1934); *Bright v. Boyd*, 1 Story 478 (1841); *Finch v. Finch*, 22 Conn. 411 (1853); *Lumpkin v. Mills*, 4 Ga. 343 (1847); *Livingstone v. McDonald*, 21 Iowa 160, 168 (1866); *Greenspan v. Slate*, 12 N. J. 426 (1953); *DeMerritt v. Johnson*, 7 Johns. Rep. 473 (N. Y. 1819); *Hayes v. Ward*, 7 Johns. Ch. 131 (N. Y. 1819); *Campbell v. Messier*, 4 Johns. Ch. 334 (N. Y. 1819); *Whightman v. Whightman*, 4 Johns. Ch. 343 (N. Y. 1820); *Fable v. Brown*, 11 S.C. Eq. 378 (1835); *Gayle v. Cunningham*, 5 S.C. Eq. 124, 133 (1824); *State v. Lehre*, 2 Const. R.S.C. 809, 813 (1811).

For more illustrations as well as for discussion of the reasons behind the courts' reliance on foreign authority, see Story, *Equity Jurisprudence*, and Kent, *Commentaries, passim*. See also Howe, "Roman Civil Law in America," 16 *Harvard Law Rev.* 358 (1902); Oliver, "Roman Law in Modern Cases in English Courts," *Cambridge Legal Essays* 246 ff. (1926); Pound, "The Influence of the Civil Law in America," 1 *La. Law Rev.* 15 (1938); Sherman, "Romanization of English Law," 23 *Yale Law J.* 323 (1913); Washburn, "The Relation of the Civil Law to the Common Law," 12 *Am. Law Reg.* 673 (1873); Wu, "Jurisprudence as a Cultural Study," 33 *U. of Detroit Law J.* 277, 292–294 (1946); Yntema, "Roman Law and its Influence on Western Civilization," 35 *Cornell Law Q.* 87 (1949).

ing the validity or invalidity of statutes. Sometimes the underlying theory is that the "general principles" themselves constitute a norm which is *uebergesetzlich*; at other times, especially in the more modern cases, a courteous bow is made in the direction of positivism by reading the "general principles" into the due process clause or a similar express provision of a written constitution.³⁶

In the United States, for example, it is clear that a State statute, especially one involving a rule of criminal or civil procedure, will be struck down if it violates the due process clause of the 14th Amendment of the United States Constitution. This does not compel the States to adopt every procedural safeguard which by virtue of other provisions of the Constitution is imposed upon the Federal courts; but a State law will be invalidated by the United States Supreme Court if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934)). In applying this minimum standard, the Court consults not only the traditions and conscience of the American people, but looks beyond national borders for indications of generally accepted principles. In *Snyder v. Massachusetts*, at 122, Mr. Justice Cardozo spoke of

immutable principles of justice, acknowledged *semper ubique et ab omnibus* (*Otis v. Parker*, 187 U. S. 606, 609), wherever the good life is a subject of concern.

Unlike Justice Holmes, who first used this Latin phrase in *Otis v. Parker*, Justice Cardozo did not limit "*ubique*" to English-speaking countries.

In *Palko v. Connecticut*, 302 U. S. 319 (1937), which involved the constitutionality of a statute permitting appeals by the State in criminal cases, Mr. Justice Cardozo made it even clearer that in identifying those safeguards which are "of the very essence of a scheme of ordered liberty," the laws of other civilized countries must be consulted. A principle which is not generally recognized by civilized nations, he implied, will not easily be regarded as so "fundamental" that a State will be compelled to adhere to it.³⁷

³⁶ *Chicago etc. v. Chicago*, 166 U. S. 226 (1897); *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312 (1893); *Holden v. Hardy*, 169 U. S. 366, 389 (1897); *Charles River Bridge v. Warren River Bridge etc.*, 11 Pet. 638 (1837); *Wilkison v. Leland*, 2 Pet. 627 (1829); *Ogden v. Saunders*, 12 Wheaton 213, 353 (1827); *Terret v. Taylor*, 9 Cranch 43, 50 (1815); *Fletcher v. Peck*, 6 Cranch 87 (1810); *Galder v. Ball*, 3 Dallas 388 (1798); *Vanhorne v. Dorrance*, 2 Dallas 304, 310 (1795); *Pavesish v. New England Life Ins. Co.*, 122 Ga. 190 (1904); *White v. White*, 5 Barb. 474 (N. Y. 1849); *Gardner v. Newburgh*, 2 Johns. Ch. 162 (N. Y. 1816); *Dash v. Van Kleeck*, 7 Johns. Rep. 477 (N. Y. 1811); *Ham v. McLaws*, 1 Bay 93, 98 (S. C. 1789); *Bank of State v. Cooper*, 2 Yerg. 599, 603 (Tenn. 1831); *Page v. Pendleton*, Wythe Rep. 211, 215 (Va. 1793); *Nunne-macher v. The State*, 129 Wis. 190, 197 (1906).

See also Corwin, "The Basic Doctrine of American Constitutional Law," 12 Mich. Law Rev. 247 (1913). Cf. Haines, "The Law of Nature in State and Federal Judicial Decisions," 25 Yale Law J. 621 (1916).

³⁷ The Federal Constitutional Court of the German Federal Republic has expressed similar views. See Schlesinger, "Western Germany: Recognition and Enforcement of Soviet Zone Criminal Judgments," 2 A. J. Comp. Law 392, 396 (1953).

3. Recently this doctrine of "fundamental" procedural safeguards has been extended by a series of international agreements, the NATO Status of Forces agreements. Under these agreements, and pursuant to traditional rules of international law, there are countless instances in which servicemen who are nationals of the sending state, as well as their dependents and other civilians accompanying the armed forces of the sending state, are subject to the jurisdiction of courts of the receiving state. Article VII, paragraph 9, of the Agreement lists certain procedural safeguards,³⁸ which seemed so fundamental to all of the signatories that their observance was expressly stipulated. In addition, when the United States Senate consented to ratification of the NATO Status of Forces Agreement, it inserted into its resolution a significant reservation. This reservation requires the commanding officers of the United States Forces stationed in other NATO countries to examine the law of each of those countries with particular reference to the "procedural safeguards contained in the Constitution of the United States." The Senate reservation also makes it mandatory for the commanding officer to request a waiver of jurisdiction, if in his opinion, under all the circumstances of the case, there is danger that in the courts of the host country the accused will not be protected because of the absence or denial of "constitutional rights he would enjoy in the United States." This has been construed to mean that the accused, even in the courts of the receiving country, shall be entitled to the same safeguards which under the doctrine of *Snyder v. Massachusetts*³⁹ would be Federally imposed upon the State courts in the United States.⁴⁰ As we have seen, the application of this doctrine of minimal or fundamental safeguards requires consideration of the general principles of law recognized by other civilized nations as well as by the United States. The ultimate meaning of the Senate reservation attached to the NATO Status of Forces Treaty thus is to re-emphasize these general principles and to admonish the military to be zealous in their vindication. In order to comply with the admonition, the military services had, and still have, to engage in massive comparative studies, especially in the field of criminal procedure. If these and other independent studies succeed in convincing the political leaders, and ultimately the public opinion of the countries involved, that on the fundamental requirements of a fair procedure there is a substantial core of agreement between common law and civil law systems, jurisdictional disputes may become less conspicuous in the headlines.

4. Clarification and formulation of the "general principles" may contribute to the solution of some of the most disturbing problems in the area of conflict of laws, especially of problems in which the concept of public policy or *ordre public* is involved. Let us assume the courts of one coun-

³⁸ See Rouse and Baldwin, "The Exercise of Criminal Jurisdiction under the NATO Status of Forces Agreement," 51 A.J.I.L. 29, 55 ff. (1957).

³⁹ 291 U. S. 97 (1934).

⁴⁰ See Schwenk, "Comparative Study of the Law of Criminal Procedure in NATO Countries under the Senate's Reservation in the Ratification of the NATO Status of Forces Agreement," 35 N. C. Law Rev. 358 (1957); Rouse and Baldwin, *loc. cit.* note 38 above, at 59-60.

try are asked to recognize and enforce a judgment rendered in another country. If the foreign court had jurisdiction, and if the requirement of reciprocity is either absent or satisfied, the rule of comity normally requires such enforcement. If the foreign judgment, however, was obtained by methods which fall below the minimum requirements of a civilized system of procedure, it need not be recognized or enforced. Again, in determining what these minimum requirements are, we may have to turn to the general principles of law recognized by civilized nations.⁴¹

A foreign rule of substantive law, no less than a foreign judgment, may be the target of attack on grounds of public policy. In one form or another, most legal systems have a doctrine to the effect that a foreign law, even though it would govern the transaction at hand under normal choice of law rules, should not be applied if it contravenes the public policy of the forum. In civil law countries, this public policy doctrine often is embodied in express code provisions,⁴² some of which use the term *contra bonos mores* in addition to the term *ordre public*. These provisions easily lend themselves to nationalistic abuse by courts which believe that every rule of foreign law substantially differing from the comparable rule of their own country should be rejected as contrary to public policy. Such decisions, especially if they label the foreign law as "immoral," are apt to be offensive to the nation whose law is deprecated in this way. They also lead to unpredictable, and often erratic, exceptions engrafted upon seemingly settled rules of conflict of laws.

It is gratifying to observe the beginnings of a new trend which, if it continues, may well lead to fewer, and less offensive, decisions invoking the public policy doctrine. As an example of this modern thinking mention should be made of a recent decision of the Federal Supreme Court of Germany, in which it was held that a rule of foreign substantive law, applicable under ordinary principles of choice of law, normally will not be rejected as "immoral" or as contrary to German public policy unless it can be shown that such rule is inconsistent with the general principles of law recognized by civilized nations.⁴³ In that case an American attorney sued a German client for payment of a contingent fee. Ordinary principles of choice of law led the court to apply the law of the place where the attorney was admitted to practice, and in fact did practice, which was the District of Columbia. In the District of Columbia contingent fee agreements are valid. The defendant argued that the German provisions outlawing the contingent fee, while not applicable under ordinary choice of law rules, evince such a strong policy that the rule of the District of Columbia permitting such fees should be rejected as being *contra bonos mores*, and contravening German public policy. The Court, however, refused to look at the question from such a parochial point of view. In its opinion, utilizing extensive comparative materials, the Court demonstrated that on this issue

⁴¹ See note 37 above.

⁴² For examples see Schlesinger, *Comparative Law*, *op. cit.* note 21 above, at 455-456.

⁴³ *Dr. G. E. R. v. Free State of Bavaria*, Bundesgerichtshof, 7th Civil Division, decision of Nov. 15, 1956, VII Z.R. 249/56.

of the contingent fee there is a great deal of diversity of views among the civilized nations of the world. That being so, the Court held, it is impossible to find any common core of "general principles" concerning this particular point. It follows, according to the Court, that the public policy doctrine should not be invoked. Although the Court did not say so in terms, the clear implication seems to be that a foreign law of general application (*i.e.*, one which does not discriminate against the interests of the forum state or of its nationals or residents) will not be struck down by the sharp weapon of the public policy doctrine unless it runs afoul of a general principle of law recognized by civilized nations.⁴⁴ Conversely, it follows that statutes which do offend the collective conscience of mankind as represented by a demonstrable general principle (*e.g.*, racial laws of the Nazi type, or confiscatory decrees which provide for no compensation and purport to have extraterritorial effect), should be disregarded everywhere outside of the enacting state.⁴⁵

5. The amicable settlement of private disputes of a trans-national character, especially of commercial disputes, might be facilitated if businessmen and their legal advisers in all countries become aware of a common core of rules and principles permeating the various legal systems. Such awareness will provide a common frame of reference when settlement negotiations are conducted by lawyers brought up under different systems of law.⁴⁶ The existence and availability of a statement of "general principles" might also be expected to make the parties less hesitant to submit to arbitration. In trans-national commercial arbitration, the proceeding usually must be conducted in a country and under a set of rules which, at least to one party, and sometimes to both, is a foreign country and a foreign set of rules. The natural reluctance engendered by this fact may well be minimized if it can be shown that the basic core of the foreign rules does not differ too drastically from the general principles recognized at home.

As soon as the "general principles" are reduced to more certainty than they are now, the parties to a commercial dispute may, in addition, eliminate all problems of conflict of laws and of submission to a "foreign" law by expressly stipulating that the arbitrators shall be guided by the general principles. Such a clause is not without precedent. In drafting conces-

⁴⁴ As this example shows, it is clear that the negative finding of unbridgeable diversity of views on a given point can be as significant, for practical purposes, as a positive finding of the existence of a "general principle." For further examples, see below, under par. 6.

⁴⁵ See, *e.g.*, *Svit Nsrodin Padnik & Bata A. S. v. Società B.S.F. Stiftung and others* (1956), decided by the Court of Appeals of Bologna, Italy, discussed by Sommerich in 5 A. J. Comp. Law 642 (1957). Even within the enacting state, such objectionable statutes may be subject to attack on constitutional grounds. This is a question of the internal law of the enacting state. The statement in the text, which deals only with the conflict of laws question, assumes that the statute, however obnoxious, will be enforced in the enacting state.

⁴⁶ Concerning the point that commercial agreements and other instruments, if drawn against the known background of a common core of legal principles, often would avoid disputes, see above under par. 1 in fine. Presently the discussion centers on methods of settling disputes which have broken out.

sion agreements, and in other cases in which one of the parties is a sovereign ruler, a state or a state-owned corporation, this device may substantially help in creating future systems of trans-national arbitration. At the same time, the defects of some existing systems, stemming from their unilateral features,⁴⁷ might be remedied in this way.

6. In the absence of an arbitration agreement, litigation in courts of law becomes necessary for the settlement of private disputes, including those of a trans-national nature. Every practitioner knows that such litigation produces special procedural difficulties if it is governed by a substantive law with which the court is unfamiliar, and if it involves facts which cannot be proved by witnesses and documents within the court's territorial jurisdiction.⁴⁸ No experienced international practitioner will deny the fact that in a regrettably large number of cases of trans-national litigation the vindication of substantive rights and of substantive defenses is made impossible by these procedural difficulties.

One of these procedural problems, which looms large in every case in which a foreign cause of action is prosecuted, stems from the necessity of pleading and proving the applicable foreign law.⁴⁹ At the outset, the lawyer handling such a case is faced with a crucial question: Which party bears the burden of pleading and of proving the foreign law? The obvious answer seems to be that the plaintiff must plead and prove the rules of foreign law giving rise to his cause of action, and that the defendant has to plead and prove the rules supporting his affirmative defenses. But in this country, at least, we must add an important qualification. Our courts are virtually unanimous in holding that where the facts alleged by the plaintiff are such that under generally recognized principles of law they may be thought to give rise to a cause of action in any civilized country, the burden is shifted to the defendant. In such a case the defendant has the burden of pleading and proving that in the particular country in which the plaintiff's cause of action arose, the substantive rule applicable to the case is contrary to the "general principle" assumed to exist in all civilized countries. By the same token, an affirmative defense asserted by the de-

⁴⁷ See the articles by Schaer and Luther on "Arbitration Proceedings Before the Commission of Foreign Trade and Arbitration of the Chamber of Commerce of the USSR," in 2 *Recht der Internationalen Wirtschaft* 75 ff. (1956). Cf. *Matter of Amtorg Trading Corporation*, 304 N. Y. 519, 109 N.E. 2d 606 (1952). On the other hand, as has been stated in the text, there are some existing systems for settling trans-national commercial disputes which even now seek to avoid unilateral submission to foreign law by reference to the "general principles." See Jessup, *Transnational Law* 14-15, 81-82 (1956).

⁴⁸ See Jones, "International Judicial Assistance," 62 *Yale Law J.* 515 (1953).

⁴⁹ See Schlesinger, *Comparative Law—Cases and Materials* 32-139 (1950); *idem*, "Teaching Comparative Law: The Reaction of the Customer," 3 *A. J. Comp. Law* 492, 496-498 (1954), especially footnotes 9-17 where further references may be found. The literature on the subject is voluminous. Among recent writings see, e.g., California Law Revision Commission, *Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries* (1957) (The author of the study is Professor Edward A. Hogan, Jr., of Hastings College of Law); Domke, "Expert Testimony in Proof of Foreign Law in American Courts," 137 *N. Y. Law J.* (March 12 and 13, 1957) Nos. 48 and 49; Stern, "Foreign Law in the Courts: Judicial Notice and Proof," 45 *Calif. Law Rev.* 23 (1957).

fendant may be supported by a fundamental principle believed to be generally recognized by civilized nations; if so, the burden is shifted to the plaintiff to prove that in the case at hand the particular foreign law in question does not support the defense.⁵⁰

These rules of pleading and evidence are the daily bread of practitioners and judges handling trans-national litigation. But no answer has ever been given, or even essayed, to the threshold question: Which principles are so fundamental, so generally recognized by civilized nations that their worldwide acceptance may be presumed? In applying the above-mentioned rules of pleading and evidence, our courts are compelled every day to decide that a given principle is "fundamental" and "generally recognized" in this sense, and that another principle is not. Like the international courts wrestling with Article 38, they fashion pragmatic answers on the basis of judicial hunches. At present these hunches can be based only on the courts' own (probably rather local) experience.⁵¹ If the results reached in this way are less than satisfactory, we must say, again, that we cannot blame the courts. It is the comparatists who thus far have failed to provide the necessary information on the basis of which the courts could decide whether a given rule or principle of law is in fact "recognized by civilized nations."

7. Finally, I submit that over and above the more immediate practical purposes which might be served by a study of the proposed topic, such study may well, in the long run, produce benefits of an elusive but more significant nature. Would the knowledge of a common core of legal principles create a greater feeling of solidarity among peoples, first on a professional but ultimately perhaps on a popular level?⁵² Even if the answer to the question is doubtful, as of course it is, the experiment appears worth while. As one of our leading publicists, not a lawyer, recently pointed out in a thoughtful address, the development of stronger bonds of law, of legal principles which do not stop at national boundaries, may well be our only alternative to the self-destruction of mankind.⁵³ It makes a lawyer feel humble when a non-lawyer thus points to our profession's collective responsibility for the survival of the race. Is it not high time that we utilize every practicable method, however doubtful and untried, which holds some hope of enlarging the area of common ideas among the lawyers of the world?

III

What has been done up to this time to meet the need for concrete formulation of the "general principles"?

⁵⁰ See Schlesinger, *Comparative Law—Cases and Materials* 108, 112, 116, 127–132 (1950).

⁵¹ See Schlesinger, "Teaching Comparative Law: The Reaction of the Customer," 3 *A. J. Comp. Law* 498, n. 15 (1954).

⁵² Compare Bonfante, "The Idea of Law Among Civilized Peoples," 3 *Minn. Law Rev.* 445 (1919); Hamel, cited note 15 above, at 61–63; Schmitthoff, "The Science of Comparative Law," 7 *Cambridge Law J.* 94 (1939), reprinted in Schlesinger, *Comparative Law*, *op. cit.* above, at 1, 5.

⁵³ Henry R. Luce, "Our Great Hope: Peace, the Work of Justice," 43 *Am. Bar Assn. J.* 407 (1957).

In the area of human rights, some progress has been made toward reaching multinational agreement on fundamentals. Such agreement, at least verbal agreement by a large majority, is reflected in the United Nations Universal Declaration of Human Rights,⁵⁴ to be supplemented by two International Covenants on Human Rights.⁵⁵ Within a limited geographic orbit, more concrete results have been achieved by the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵⁶ This convention, which is not confined to a catalogue of substantive rights but also creates enforcement machinery,⁵⁷ seems to indicate that its signatories in good faith intend to practice what they preach. On the non-governmental level, comparative studies under the heading of "Rule of Law" have been undertaken by the International Commission of Jurists⁵⁸ and by the International Association of Legal Science, which devotes a

⁵⁴ Adopted by the General Assembly on Dec. 10, 1948. For text, see 1948-49 U. N. Yearbook at 535 (1950). For comments, see, *e.g.*, Jessup, *A Modern Law of Nations* 92 (1949); Lauterpacht, "Universal Declaration of Human Rights," 25 *Brit. Yr. Bk. Int. Law* 354 (1948); "International Human Rights—A Symposium," in 14 *Law and Contemp. Prob.* (1949); Note, "The Declaration of Human Rights, the United Nations Charter and their Effect on the Domestic Law of Human Rights," 36 *Va. Law Rev.* 1059 (1950).

The Declaration has become a formal source of law by incorporation into various international agreements, *e.g.*, Agreement between Italy, United Kingdom, United States and Yugoslavia (1954), which divided the Free Territory of Trieste. See 1954 *Annual Review of United Nations Affairs* (ed. by C. Eagleton, W. Chamberlin and R. Swift) 90.

⁵⁵ For text, see 27 *Dept. of State Bulletin* 23 (1952). For comments, see, *e.g.*, MacChesney, "International Protection of Human Rights in the United Nations," 47 *Northwestern U. Law Rev.* 198 (1952); Bebr, "International Protection of Human Rights and Freedoms," 29 *Philippine Law J.* 312 (1954). The two Draft Covenants were adopted by the Commission on Human Rights in 1954 and approved by the Economic and Social Council. Discussion concerning them still continues in the Third Committee of the General Assembly; it is expected that they will be brought to a vote by the end of the 13th Session of the Assembly. See General Assembly Res. 1041 (XI) (1956).

⁵⁶ The convention (excluding the provisions about the establishment of the European Court of Human Rights) became effective on Sept. 3, 1953. For text, see 45 *A.J.I.L. Supp.* 24 (1951). On the convention, see, *e.g.*, *The European Convention on Human Rights* (1952); *id.*, popular edition (1953), both published by the Directorate of Information of the Council of Europe; Myers, "Human Rights in Europe," 48 *A.J.I.L.* 299 (1954); Northrop, *European Union and United States Foreign Policy* 40-44 (1955).

⁵⁷ Questions relating to violations of human rights recognized in the convention are referred to an international commission and then possibly to the European Court of Human Rights. The commission was elected in 1954. See Myers, "The European Commission on Human Rights," 50 *A.J.I.L.* 949 (1956). The court has not yet been called into being. On the provisions about the court, see Schapiro, "The European Court of Human Rights," 2 *U. of Western Australia Law Rev.* 65 (1951).

⁵⁸ See Bulletin No. 5 and Newsletter I (April, 1957) of the International Commission of Jurists. For purposes of its inquiry, the Commission has defined rule of law as "adherence to those institutions and procedures, not always identical but probably similar, which experience and tradition in the different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be essential to protect the individual from arbitrary government and to enable him to enjoy the dignity of man." See Foreword by Professor Norman S. Marsh, to the Commission's Report entitled "The Hungarian Situation and the Rule of Law," p. 3 (1957).

considerable part of its present efforts to the subject. When these inquiries are concluded, they may throw light on certain "general principles" recognized by all, or a great majority, of the civilized nations of the world.

These inquiries, however, important as they are, are essentially limited to portions of the subjects which in legal parlance we would describe as criminal procedure and administrative law, with an admixture of constitutional law. Their emphasis clearly is on public law. No attempt has been made to find and formulate the common core of the world's legal systems in the area of substantive private law, including commercial law, and of civil procedure. Until about a year ago even the feasibility of such an attempt had not been seriously examined. During the last year, with the help and encouragement of his faculty colleagues at the Cornell Law School⁵⁹ and of other scholars,⁶⁰ the author has worked on the blueprint of a project designed to fill this void.⁶¹ The lines on the blueprint are still tentative, and perhaps a bit blurred. It is not even quite certain what the name of the project should be. Stressing its substance, one might call it "Research on General Principles of Law." If primary emphasis is placed on the method, to which reference will be made instantly, the proper name would be something like "Cornell Faculty Seminars."

IV

The project will be one of challenging difficulty, to put it mildly. Not only will it deal with a topic which has never been systematically explored; it will in addition employ a novel method of operation.

The method, as presently contemplated, will consist of bringing to Cornell University outstanding legal scholars representing the major legal systems of the world.⁶² This will make it possible to exchange views and to use the comparative method on a multilateral rather than a bilateral scale.

The use of the seminar method, of course, does not mean that the participants will just sit around and talk. The projected exchange of views will have to be based on solid research preceding each session. But the conversational method may have some advantages over the combined effect of the individual work which each scholar could do in his own library in his own country. Information and experience will be pooled. Misunderstandings will be minimized. For some time different participants may talk about different things, failing to focus their ideas on common problems and common concepts. This is customary in intellectual exchanges among lawyers brought up in different legal systems. They simply do not speak

⁵⁹ Professor Robert S. Pasley, in particular, has contributed greatly to the methodological research which is necessary at the threshold of the Project, and to the preparation of the working papers referred to below under IV.

⁶⁰ Acknowledgment is made at this point of the valuable suggestions received from Professor W. J. Wagner of Notre Dame Law School, and from Mr. Phaedon Kozyris, Research Assistant in the International Legal Studies Program at Cornell University.

⁶¹ The project is supported by a Ford Foundation grant which Cornell University received for international legal studies.

⁶² The intricate problems of selection which arise in this connection are detailed in the working papers mentioned below, p. 752.

the same language. But after a while the misunderstandings will be discovered, and the common focus will be established. In a seminar room this may be a matter of minutes or hours. Among scholars who sit in their respective libraries and write books and articles thousands of miles apart from each other, the same process may require decades.⁶³

Basically, this operating method may appear simple; but as one attempts to visualize the project in actual operation, from the time when potential participants are invited until the final publication of formulated and agreed-upon results, one becomes aware that the project bristles with problems and difficulties. Questions of definition and of basic philosophical assumptions arise at the threshold. It is hardly possible to brush these problems aside by the usual device of working hypotheses, which are assumed to be correct for present operational purposes. Unless we have some idea of what we mean, for instance, in speaking of "law" in the present context, we cannot even begin to pick the participants in our seminars. Do we choose only legal scholars, or do we need philosophers and social scientists? Or can we, to use the famous phrase coined by the late Judge Jerome Frank, rely on legal practitioners as "practicing anthropologists"? This one problem is mentioned as an example, because it shows the interplay between the basic, perhaps highly theoretical threshold questions, and the practical decisions which will have to be made in the establishment and operation of the seminars.

To some of these problems there may be no absolutely valid answer in the sense that this one answer is right and that every different answer would be wrong. In part, intuition and experimentation will have to guide the project. It does not follow, however, that the intuition of one individual, or of a small group, is always and necessarily the best available guide. It should be possible to avoid at least those mistakes which can be obviated by taking counsel with others known to have relevant knowledge and experience. For this reason, the venture was started by drawing up a long list of questions—questions which are likely to arise in arranging and operating the projected seminars. Necessarily, these questions cover almost the whole methodological range of the comparative process. Working papers containing these questions, together with references and some tentative answers,⁶⁴ will be submitted to a number (it is hoped a fairly substantial number) of leading scholars and practitioners representing various legal systems. In part, these consultations will have to be conducted by correspondence. It is hoped, however, that at least some of the consultants will find the time for a face-to-face exchange of views—a procedure which has been initiated already.

If the project, in the opinion of the best qualified experts, is not practicable, it should be abandoned before it consumes too much effort. If, on

⁶³ The interpenetration of ideas which can be expected from this method may not remain limited to the participants themselves. Many of them will be able, when they return to their own countries after a sufficiently extended period of such exchange, to impart to their students at home the benefit of their own broadened understanding.

⁶⁴ A first tentative draft of this document has just been completed by Professor Robert S. Pasley and by the author of this paper.

the other hand, sufficient encouragement is received to continue, it may be possible, in the light of the advice obtained, more wisely to determine such questions as the nature and sequence of the specific topics to be covered, the number of legal systems to be represented, and the *modus operandi* of the seminars.

The magnitude of the task is such that, even with the best advice, only part of the ground can be covered within the ten-year period for which the project is planned. This is no cause for worry. Once it is proved, upon completion of a pioneering experiment, that the method is feasible and that the results are useful, it will not be difficult to generate the enthusiasm, and to find the manpower and support necessary to finish the task.

The initial issue is whether the pioneering experiment is worth while. The proposed series of consultations will, it is hoped, throw some light on the question whether the intended effort is not wasteful or misdirected, and whether there is at least a reasonable chance that the project will result in a contribution, however small or theoretical, toward a better community of nations and of men.

EDITORIAL COMMENT

GEORGE A. FINCH

September 22, 1884–July 17, 1957

George A. Finch died on July 17, 1957, at the age of 72. A pillar of the American Society of International Law has fallen. For nearly half a century he had an active and essential part in its work. His last appearance was at the Annual Meeting in April, 1957, when he delivered an address on "Navigation and Use of the Suez Canal."

He was Secretary of the Board of Editors and Assistant Secretary of the Society, 1909–1924, managing Editor and Secretary, 1924–1943, Editor-in-Chief and Vice-President, 1943–1953, Honorary Editor-in-Chief and Honorary Vice-President, 1953 to his death. During these stirring periods, including two world wars, he was a constant contributor to the JOURNAL by way of editorials and leading articles besides addresses at annual meetings. These papers cover a remarkable range in the field of international law. Gathered together they would make an impressive exposition of the principles of international law and practice. Anyone who has worked on the JOURNAL knows the high quality required of the papers printed therein, mostly prepared by experts on the subjects treated, and it is the duty of the Editor-in-Chief to examine them with critical care. He once remarked that his work on the JOURNAL meant more to him than several years of graduate study at a university.

He graduated in the class of 1907 from Georgetown University Law School and on June 10, 1957, was among the golden jubilarians who received citations from the University in celebration of the anniversary.

Finch was a law clerk in the State Department at the time Dr. James Brown Scott, the prime mover and originator of the Society in 1905, was Solicitor for the Department. In 1909 Finch was assigned as secretary to the United States Commission to Liberia and aided in the preparation of its report. Later when the new office of Counselor was created he was assigned there. Recognizing Finch's abilities, Dr. Scott, when he left the Department of State in 1911 to become the first Secretary and Director of the Division of International Law of the newly organized Carnegie Endowment for International Peace, took Finch with him. Thereafter Finch was the power behind the throne at the Endowment and also in the Society of which Dr. Scott was then Secretary and Managing Editor of the JOURNAL. I heard it said at the time that Dr. Scott was a misfit for the Carnegie job but Finch replied that it was his job to see that this did not prove to be true. And he kept his word.

Though the JOURNAL was an exacting endeavor and required meticulous attention which Finch gave tirelessly and enthusiastically over the years, the Carnegie Endowment with its ramifications in all phases of the world peace movement was his soul-consuming job. His sound judgment and apt-

ness in appraising a complex situation—unusual for a man so young—as well as his earnestness of purpose bespoke a successful future at the Endowment. He was assistant Secretary and Assistant Director of the Division of International Law to 1940 and upon the retirement of Dr. Scott, he was elevated to Secretary and Director and was made a Trustee of the Endowment. He was given responsible assignments and made the most of these opportunities.

When the United States entered the first World War the Endowment offered its services to the government and Finch was pressed into service on special occasions. Thus, he was an expert on international questions attached to the War Industries Board in 1918. After the United States entered the war he was secretary and assistant to the State-Navy Neutrality Board which rendered opinions on various war questions for the information of the Secretary of State. After the Armistice he was named Assistant Legal Adviser to the American Commission to negotiate peace at Paris in 1919.

After the war his foreign experience and travel continued. He was a delegate of the Endowment at the Second, Third and Eighth Pan-American Scientific Congresses and also at the Conference of American States at Lima. He was representative of the Endowment to the Orient in 1929 and consultant to the United States Delegation at the Conference on United Nations Organization at San Francisco in 1945. For his interest in Latin American affairs he was made Knight Commander of the Order of Cespedes (Cuba) and of the Order of Balboa (Panama). He was also given an honorary degree by the University of Thessalonika Law School.

Dr. Scott's admiration for and appreciation of Finch's loyal and selfless assistance found grateful acknowledgment in his will. He also made Finch his literary executor. At his death Finch had, unfortunately, not completed Dr. Scott's biography, which would have traced the movement for international law and order in the early part of this century to which Dr. Scott had devoted his life. He it was who launched Finch into that movement in 1911. Thereafter through the Endowment, Finch participated in almost every event of importance that marked the progress of that movement. The Endowment's activities, to mention a few, included sponsoring conferences and exchanges of teachers of international law, granting fellowships and scholarships for the study of international law in the United States and abroad, publishing the *Classics of International Law* and other valuable series, such as Hudson's *International Legislation*, *World Court Reports*, the *Hague Court Reports*, *Pan American Conferences*, establishment and support of the Hague Academy of International Law, and establishment of the American Institute of International Law.

These activities and achievements brought an outlook on the field of international law and world peace which naturally found expression not only in the pages of the JOURNAL but in his book on "The Sources of Modern International Law," in his addresses before the Inter-American Academy of Comparative and International Law, of which he was president,¹ in

¹ The titles of these addresses were "The Punishment of War Criminals," "The International Control of Atomic Energy," "Sovereignty Over Polar Areas," "Sources of Modern International Law."

the lectures which he was invited to give at the University of Michigan, the University of Washington at Seattle, McGill University at Montreal and the Academy of International Law at The Hague (where he was a member of the Curatorium for some years) and in his seminars as Professor of International Law at Georgetown University School of Foreign Service.

He was asked to appear as international law expert before Senate committees considering legislation on phases of international law or international relations. For example, he was called to testify before the Senate Subcommittee on Disarmament last January on two questions: (1) The relation between the control of armaments and the settlement of the major political differences between nations; (2) What basic powers an enforcement agency must have to be effective. On his death this testimony was reprinted as a tribute to his memory in the *Congressional Record* at the instance of Senator Bricker. In submitting the statement Senator Bricker said: "It shows very clearly that strict adherence to the rule of law among nations, to the development of which George Finch devoted his life, is the only alternative to global chaos."

George Finch was a member of the American Bar Association and Vice-Chairman of its Committee on Peace and Law through the United Nations, a member of the Advisory Committee of the Inter-American Bar Association, of the Research in International Law of the Harvard Law School, and of the American Institute of International Law. He was also an Associate Member of the *Institut de Droit International*, a Corresponding Member of the Panamanian Academy of International Law, and Honorary Collaborator of the Hellenic Institute of International and Foreign Law.

George Finch took a leading part in the American Bar Association discussions of the Bricker amendment to the Constitution and was chosen to prepare the case of the Association in favor of the amendment. His papers and speeches in behalf of the amendment and his testimony before the Senate Subcommittee above mentioned rank with the best examples of his style and philosophy.

George Finch was a conservative in his attitude toward international questions. We have noted his achievements. What was his philosophy? A few quotations will indicate the trend. The general aim of his life was "the substitution of reason and morality for force in the settlement of international disputes." "To prepare the world for the rule of right the science of International Law was created." "A definition of aggression and a compulsory jurisdiction for the submission of legal questions to the International Court of Justice should have been agreed upon long ago." He believed vigorously in the sanctity and binding character of treaties. "All states great and small are entitled to equal rights of sovereignty and independence in their external relations and to freedom from intervention in their internal affairs." "The time has long since passed when the nations having a sense of honorable obligation should consider withdrawal of recognition of any nation which persistently refuses to comply with fundamental international obligations."

On problems of the present day George Finch had definite ideas. He

was of course utterly opposed to international Communism which, he said, denies the doctrines of Christianity and the divinely endowed rights of man. In view of the known record of Communist governments as to the breach of treaty engagements, he thought it would be suicidal for the United States to stop the production of any weapon it might need to deter attack. "It would not be feasible to vest non-forceable enforcement powers in an enforcement agency as long as member nations are bent on the use of force to impose their wills upon other members." He deemed it impracticable to endow an enforcement agency with powers of inspection that allowed "hordes of aliens to swarm over the country" and engage in "legalized spying." He thought legal machinery centered on an international court could be devised to deal with violations of an arms control agreement, *if* the signatories abide by the rules of law in their international conduct; otherwise it would be impossible. These thoughts taken from his testimony before the Senate Subcommittee above mentioned are by no means a complete summary of his philosophy (which space forbids) but they show the nature and character of his attitude toward international law and certain questions of the day.

One is at once impressed with the thorough preparation of his papers, the historical setting presented, but most of all with the logic and common sense of his arguments. As I look back on the years of close association with George Finch, I carry away deeply engraved impressions of unbounded energy, dogged determination, unbiased sense of justice, deep sincerity relieved with a vein of benign humor—all inspiring respect and affection in the hearts of those fortunate enough to know and work with him.

LESTER H. WOOLSEY

POLITICAL AND HUMANITARIAN APPROACHES TO LIMITATION OF WARFARE

A point of convergence is reached by two diametrically opposite approaches to the problem of the regulation or limitation of warfare. Henry A. Kissinger has produced an extremely thoughtful and interesting book entitled *Nuclear Weapons and Foreign Policy*. This volume is the product of the author's work with a study group at the Council on Foreign Relations, a group which included a large number of persons with experience in foreign affairs, in military affairs, in science and in government. This is a substantial volume of 455 pages which requires careful reading. The other approach is to be found in a little pamphlet of 168 pages published by the International Committee of the Red Cross in September, 1956, entitled *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*. These Rules, with their compact but lucid commentary, were elaborated as a result of consultation with the National Societies of the Red Cross and with a Committee of Experts. This Committee of Experts was drawn from twelve different countries and, like the Council group, included military men, persons with broad governmental experience, and a number of scholars. The Red Cross Draft Rules represent a revision of an earlier draft published in 1955.

Kissinger approaches the problem from a hard-headed analysis of international politics, the fundamental interests of the United States, and the

potentialities of, and limitations upon, military strategy. The International Committee of the Red Cross (commonly referred to as the ICRC) approaches their problem from the basic humanitarian interest for which it is so well known, stressing its essential neutrality in political matters. Both Kissinger and the ICRC are concerned with the devastating potentialities of nuclear war. Both, with a good deal of realism, suggest possibilities for mitigating the horror of the nuclear holocaust. The ICRC stresses the point that because of its essential neutrality "it cannot take direct action to prevent or stop wars, except by rejecting the very idea of war; but it does at least strive continuously to limit their tragic consequences."¹ Kissinger, in some of his finest chapters, analyzes the constant threat to the non-Communist world from Soviet power driven by consistent adherence to a basic doctrine which preaches the eventual destruction of the non-Communist societies. Given the resulting area of international conflict, Kissinger proceeds to argue for the possibility of limited war as an instrument of policy in the nuclear period. Kissinger explains that a limited war cannot be defined in purely military terms. "Limited war is essentially a political act."²

Limited war reflects an attempt to *affect* the opponent's will, not to *crush* it, to make the conditions to be imposed seem more attractive than continued resistance, to strive for specific goals and not for complete annihilation.³

The ICRC addresses its rules for the protection of the civilian population to declared war "or any other armed conflict" including "armed conflict not of an international character."⁴

Kissinger repeatedly points out that under the concept of limited war, since the decision is not wholly in the military field, there must be constant reliance on political action and on diplomacy. The ICRC in drawing up its draft rules stops short of proposing an international convention by which they might be accepted, constantly observing the proper limits of its own activity and leaving political action to governments.

There is no soft-headed thinking in either study; both take account of hard realities. The ICRC, with its long background of studies in the amelioration of the condition of civilian populations, the wounded, and prisoners of war, is quite aware of the limits on the possible and it has made full use of its very experienced and practical-minded experts. Throughout its Commentary, it calls attention to the fact that the most idealistic will feel its proposals fall short of the ultimate *desiderata* but that it has gone as far as is feasible. It has clearly kept in mind that throughout the history of the various regulations of methods of warfare from the Declaration of St. Petersburg of 1868 down through the Geneva Conventions of 1949 and the latest convention in the field, that of The Hague in 1954 for the Protection of Cultural Property in the event of Armed Conflict, successful or even partly successful limitations on warfare have been

¹ *Op. cit.* 3.

³ *Ibid.* 140.

² *Op. cit.* 141.

⁴ *Op. cit.*, Art. 2, commentary, pp. 40 ff.

characterized by a due regard not only for humanitarian considerations but also for military necessity.⁵

It is not many years since a vigorous and perhaps a dominant scholarly opinion felt that any further attempts to deal with the actual conduct of warfare were undesirable because they would weaken the central drive to eliminate war entirely. But it is clear that fighting even between armies has not been eliminated and that various types of armed struggles will unfortunately still take place. Kissinger refers to four possible categories of limited wars.⁶ The first would be between "secondary powers, such as between Israel and Egypt or between India and Pakistan." The second would be wars involving either the Western Powers or the Soviet bloc against distinctly inferior Powers such as Soviet intervention in the satellites "or United States military action in the Western hemisphere" (*sic*). As a third category he suggests a struggle between a major and a minor Power which might spread as in the case of the Chinese move against South Vietnam "or the Anglo-French 'police action' against Egypt." Fourthly he considers the problem of limited war "which begins explicitly as a war between the major powers" but which remains limited. Kissinger gives a few examples of limited war in history but has not drawn on the literature of international law which is extensive on this subject.⁷ Kissinger's extensive bibliography refers to none of the works familiar to international lawyers, and indeed the only one of the international law fraternity who seems to be mentioned is Quincy Wright, who is cited not for his magisterial study of war but for an article on "World Politics" in *Air Affairs*, Vol. 1 (1947). On the other hand, the ICRC is of course thoroughly familiar with the international law literature in this field.⁸

It is pertinent to note that the *Institut de Droit International* established in 1954 its 25th Commission to consider the question whether a new restatement should be made of the law of war. This Commission, under the distinguished guidance of Professor François of The Netherlands, published its first report last year.⁹ No member of the Commission dissented from the view that an attempt should be made to restate the law of war, although there were natural differences of opinion as to the exact nature and scope of the task which the *Institut* should undertake. As Professor Kunz says, "The times of ignoring the laws of war are over."¹⁰

It may be remarked that both the ICRC and the *rapporteur* of the

⁵ See Royce, *Aerial Bombardment and the International Regulation of Warfare*, Chs. I, IV (1928).

⁶ *Op. cit.* 137-138.

⁷ See the references in the present writer's editorial comment, "Should International Law Recognize An Intermediate Status Between Peace and War?" 48 A. J. I. L. 98 (1954), and "Intermediacy," 23 Nordisk Tidsskrift for International Ret 16 (1953).

⁸ For example, it cites at page 39 Kunz, "The Laws of War," 50 A.J.I.L. 331 (1956), and Lauterpacht, "The Problem of the Revision of the Law of War," in 29 Brit. Yr. Bk. Int. Law 360-382 (1952).

⁹ The *rapporteur*, in his Provisional Report, refers to the ICRC draft of 1955 and to Kunz's article cited in the preceding note.

¹⁰ Kunz, "The New U.S. Army Field Manual on the Law of Land Warfare," 51 A.J.I.L. 388 (1957).

Institut agree that the laws governing the conduct of war must equally be applicable in cases where the competent organ of the United Nations has designated one of the parties as an aggressor.¹¹ Kissinger does not use the same vocabulary, but he clearly would not distinguish for these purposes between the "just" and the "unjust."

Kissinger constantly emphasizes the point that the horror of the nuclear holocaust deters the use of these weapons or at least creates a psychological block against their use. He never fails to stress the absolutely essential requirement that the United States should maintain its deterrent force which would be capable of striking the Soviet Union if the Soviet Union should attempt to launch a nuclear attack. However, he then considers the possibilities of lesser struggles and the need to be prepared to fight them. Although he does not touch on this subject at all, it is entirely pertinent to a consideration of his thesis to study the problem to which the ICRC devotes itself, namely the protection of the civilian population. Obviously one must bear in mind that fighting may take place not only in the heart of an enemy country but in some peripheral country, for example, in a Korea, in a Vietnam or in a Hungary. Not only would there be no military advantage in unnecessarily injuring civilian populations under such circumstances, but on the contrary, the military advantage would lie in protecting them to the greatest possible extent.

It is generally asserted, particularly by those who have not devoted much study to the history of the laws of war, that it is quite a futile exercise to seek for any regulation of warfare. Nevertheless, at the moment when this is being written the disarmament subcommission of the United Nations at London is seriously discussing a much more difficult task, namely the limitation of armaments, including a limitation on the production, testing and use of atomic weapons and materials. If this is a feasible exercise in statesmanship so also is the consideration of the limitation of the dangers incurred by the civilian population in time of war. Moreover, President Eisenhower has recently laid great emphasis on the efforts of the United States to produce "clean" atomic bombs which would have little or no radioactivity fall-out.¹² The problem of the "clean" bomb is also mentioned by the ICRC¹³ and by Kissinger.¹⁴

The ICRC makes "every effort to ensure that if violence is used, as is always possible, certain humane rules . . . protect the people who are not taking part in the struggle."¹⁵ Kissinger urges that

The United States should . . . shift the emphasis of disarmament negotiations from the technically almost impossible problem of preventing surprise attack to an effort to mitigate the horror of war.¹⁶

Kissinger would seem to agree with the conclusion of the ICRC experts that from a military appreciation, indiscriminate air bombardment has

¹¹ ICRC, *op. cit.* 45; Institut, report, p. 9. The present writer shares this view: see A Modern Law of Nations, Ch. VIII (1946).

¹² President Eisenhower's Press Conference July 3, 1957, N.Y. Times, July 4, 1957.

¹³ *Op. cit.* 109.

¹⁴ *Op. cit.* 232.

¹⁵ *Op. cit.* 3.

¹⁶ *Op. cit.* 231.

not "paid."¹⁷ The ICRC would no doubt agree with Kissinger's conclusion:

A program which sought to establish some principles of war limitation in advance of hostilities would seem to make fewer demands on rationality than one which attempted to improvise the rules of war in the confusion of battle.¹⁸

It is true that Kissinger is not attempting to lay any stress upon the conclusion of agreements among nations about limited war, and of course he places no reliance on promises, whether in treaties or otherwise, emanating from the Soviet Union.¹⁹ He is concerned to show the self-interest which would induce both sides to recognize the value of limited war. He faces the difficult task of convincing people, particularly military people, that they must change their fundamental conceptions of war. In this respect his problem is not greatly different, it is believed, from that which has been suggested concerning the need for breaking away from the traditional dichotomy in international law between peace and war.²⁰ The rules governing the treatment of prisoners of war, which is one of the accomplishments to which the ICRC has so greatly contributed, rest on self-interest, although the movement for their adoption had a humanitarian motivation. It is true that for this purpose it was necessary to have various detailed provisions partly for the guidance of protecting Powers. But the observance of the conventions—and they have been observed by and large in spite of some violations—results from the fact that they have been drafted realistically by military people, with the urging indeed of humanitarians, but always with an eye to practical self-interest. Kissinger, in effect, argues that an intelligent appreciation of self-interest might well lead to a continued limitation of a war and to a cautious type of military tactics which would obviate the possibility of the limited war developing into the nuclear holocaust.

It is not the purpose here to review the details of Kissinger's book or the details of the rules proposed by the ICRC. What is suggested is that these very different but concurrent studies both reject the idea that it is impossible to achieve some limitation of warfare. The realists would be acting unrealistically if they fail to appreciate the contribution which the moralists and legalists can make to an essentially common objective.

PHILIP C. JESSUP

THE HONDURAS-NICARAGUA BOUNDARY DISPUTE

Students of American Constitutional law, who are familiar with the numerous boundary disputes between the States of the United States and with the principles laid down by the Supreme Court for their solution, will follow with particular interest the long-standing dispute between Honduras and Nicaragua which now happily has been submitted to the

¹⁷ ICRC, *op. cit.* 22.

¹⁸ *Cf. ibid.* 232.

¹⁹ Kissinger, *op. cit.* 230.

²⁰ See the articles cited *supra*, note 7.

International Court of Justice for solution. In the suits between the States of the Union the questions at issue have been of relatively easy solution, most of the cases dealing with rivers as boundaries. Only in the case of the suit brought by Rhode Island against Massachusetts was an original colonial boundary involved, offering a parallel to the numerous Latin American controversies.

Due to vast areas of unexplored land the Latin American states had trouble with their boundary lines from the first days of their independence. The Spanish administrative divisions had of necessity to be described in terms of uncertain geographical boundary markers. When the independence of Central America was declared in 1821 the boundaries of the United Provinces followed those of the Captaincy-General of Guatemala under the Vice-Royalty of New Spain. Then, when the five Provinces went their separate ways as independent "republics" in 1838, the existing boundary lines were retained, including certain doubtful areas which had never been definitely marked off, the rule of *uti possidetis*, the test of effective possession, conflicting at times with the rule of *uti possidetis juris*, the right to possess, independent of the actual fact of possession.

On May 1, 1957, the Council of the Organization of American States met in special session to consider a cablegram addressed by the Honduran Minister of Foreign Affairs to the Chairman of the Council, Ambassador Lobo, denouncing Nicaragua as an aggressor for having invaded with military forces Honduran territory, crossing the boundary line of the River Coco or Segovia fixed by the award of the King of Spain made on December 23, 1906.¹

On May 2, in the presence of renewed complaints of aggression, asserted this time by Nicaragua as well as Honduras, the Council met again in special session and adopted a resolution convoking the Organ of Consultation provided for by the Inter-American Treaty of Reciprocal Assistance and constituting itself as provisional Organ of Consultation. At the same time the resolution authorized the chairman to appoint a committee to investigate on the spot the facts of the situation, and it appealed to the two governments to abstain from any act that might aggravate the situation between their countries.² On the same day the Chairman of the Council appointed a Committee of Investigation consisting of representatives of Argentina, Bolivia, Mexico, Panama and the United States, the representative of Panama being elected Chairman. The committee left for Panama next day, and from there by United States military plane, first to Tegucigalpa and then to Managua. At both capitals the committee presented to the governments a draft agreement for the cessation of fighting; and upon signature of the two governments the agreement entered into force at the same hour, 7:30 p.m., on May 5, the day after the arrival of the committee. The promptness with which the agreement

¹ Acta de la Sesión Extraordinaria celebrada el 1º de Mayo de 1957 (Pan American Union Doc. C-a-242).

² Acta de la Sesión Extraordinaria celebrada en la tarde del Jueves 2 de Mayo de 1957 (Pan American Union Doc. C-a-244).

was signed suggested that the skirmishing along the border was more of a perfunctory demonstration of claims than a determination to decide the issue by armed force.

The next step was to secure an agreement providing for the mutual withdrawal of troops along the disputed frontier, which was accomplished on May 10, the two drafts being prepared by the committee and signed by the respective governments at midnight and at 3:30 a.m., becoming effective at noon. The Committee of Investigation thereupon returned to Washington and submitted its report to the Council of the Organization of American States acting provisionally as Organ of Consultation.³

The report of the committee set forth in detail the successive steps in securing the two agreements from the governments in controversy, and it was promptly adopted by the Council, which thereupon proceeded to appoint the same members to constitute an *ad hoc* committee to try to work out, within a limit of thirty days, a procedure for the settlement of the controversy acceptable to both parties. The *ad hoc* committee held numerous sessions, but without being able to bring about a settlement by direct negotiation, with the result that the Council appointed two of the members of the committee to put before the two governments alternative proposals for the settlement of the dispute: an arbitral tribunal; a single arbiter; the International Court of Justice at The Hague—all three procedures being contemplated in the Pact of Bogotá of 1948, which both parties had ratified, Nicaragua's reservation covering the very issue before the Council.

On June 28, the Chairman of the Committee, Ambassador Arias of Panama, announced to the Council that the parties had chosen to submit the dispute to the International Court of Justice. Some weeks later, on July 21, the Ministers of Foreign Affairs of the two governments signed at the Pan American Union an agreement on the procedure to be followed in presenting to the International Court of Justice "their disagreement concerning the arbitral award handed down by His Majesty the King of Spain on December 23, 1906."⁴ A maximum period of ten months from September 15 is fixed within which Honduras will submit a written application instituting the proceedings before the Court. Article 4 of the agreement provides that

The decision, after being duly pronounced and announced to the Parties, shall settle the disagreement once and for all and without appeal, and shall be carried out immediately.

Then, as if to express publicly the regret of the two governments at the skirmishing along the disputed boundary line, Article 6 concludes by saying:

³ Situation between Honduras and Nicaragua: Report of the Investigating Committee (Pan American Union Doc. C-1-341) (English)).

⁴ Agreement between the Ministries of Foreign Affairs of Honduras and Nicaragua on the Procedure to be Followed in Presenting to the International Court of Justice their Disagreement concerning the Arbitral Award Handed Down by His Majesty the King of Spain on December 23, 1906 (Pan American Union Doc. C/INF-337 (English)).

In implementing the provisions of this Agreement, the Government of Honduras and the Government of Nicaragua are mindful of the noble spirit of Point 6 of the decision approved on July 5, 1957 by the Council acting provisionally as Organ of Consultation in which it is pointed out that Honduras and Nicaragua are linked in a very special way by geographic and historic ties within the Central American community.

—a graceful apology to the Council for giving it so much trouble over what was after all a family affair.

The submission of the case to the International Court of Justice calls for a decision on the specific question of the validity of the arbitral award of the King of Spain. In the interpretation of this award account will have to be taken of the Bonilla-Gámez Treaty signed at Tegucigalpa by the two countries on October 7, 1894, in which provision was made for a Mixed Commission on Boundaries and rules were laid down for the guidance of the commission, among which was the rule:

3. It will be understood that each Republic is owner of the territory which, at the time of Independence, constituted the provinces of Honduras and Nicaragua.

Article III of the treaty provided that in the event that the Mixed Commission should be unable to agree upon certain points of the boundary, they should be submitted to arbitration, the neutral member of the arbitral tribunal to be a member of the diplomatic corps accredited to Guatemala, and if no member of the diplomatic corps should be available, then, among other possible arbiters, the Government of Spain. A ten-year limit was fixed within which the treaty was not to be modified or the question settled by any other method.

On the basis of the Bonilla-Gámez Treaty the Mixed Commission met and fixed the boundary from the Pacific Coast up to Portillo de Teotecacinte, but disagreed in respect to the rest of the boundary from that site to the Atlantic. In view of the disagreement, the arbitrators from the respective countries met at Guatemala City on October 2, 1904, and, in accordance with Article V of the treaty, designated the King of Spain as the sole arbiter. The designation was approved by both governments and representatives were appointed to present their respective cases to the King of Spain. The award of the King of Spain was given on December 23, 1906, fixing the mouth of the Rio Coco or Segovia as the beginning of the boundary on the Atlantic, adjacent to Cape Gracias a Dios, and thence following the Rio Coco to the Poteca or Bodega tributary and thence upstream to the River Guineo or Namasli and from that junction to the Portillo Teotecacinte.⁵

The succeeding history of the controversy is long and involved, marked in 1912 by an assertion by Nicaragua of the nullity of the award; in 1918 by mediation of the United States; and in 1920 by a meeting of the Presidents of the two countries at Amapala and an agreement the following year to submit the question of the validity of the award to the decision of the

⁵ The text of the award in English may be found in 100 British and Foreign State Papers 1096.

Chief Justice of the United States; in 1931 by the Irias-Ulloa Protocol; and in 1937 by a new mediation commission. None of the proposed measures, however, led to a settlement.⁶ Then the controversy, after remaining more or less quiescent for some fifteen years, came to a head last February 21, when the Government of Honduras created the Department of "Gracias a Dios" with the Rio Coco or Segovia as the boundary. A month later Nicaragua occupied part of the disputed area, contesting the territorial claim of Honduras, and that government in turn promptly denounced the occupation as aggression and appealed to the provisions of the Treaty of Reciprocal Assistance.

The principal issue in the case will be whether the award of the King of Spain was within the terms of the Bonilla-Gámez Treaty. An arbitral award, however final and definitive the parties may pledge it to be, must obviously be within the terms of reference, both in respect to the procedure to be followed by the arbitrator and in respect to the factual basis of the decision. It will be the task of the International Court of Justice to determine whether the alleged deviations of the award from the terms of reference are sufficient to nullify it, and, as a minor issue, whether the express or tacit consent of a government in the process of executing a treaty can set aside the terms of the treaty itself. A broad review of the issues may be found in the Minutes (*Actas*) of the Council of the Organization of American States on the occasion of the extraordinary session held in answer to the petition of the Government of Honduras on May 1, 1957, at which the note of the Foreign Minister of Honduras was read denouncing Nicaragua as an aggressor "for having invaded Honduran territory with military forces, crossing the dividing line of the Coco or Segovia River fixed by the award of the King of Spain on December 23, 1906," followed by the reply of the Nicaraguan representative on the Council surveying the authorities on international law which justify the rejection of an arbitral award in excess of the terms of submission and setting forth the principal grounds of nullity (*vicios de nulidad*) of the award.⁷

It is of interest to observe that the agreement signed by the two governments on July 21 setting forth the procedure to be followed in presenting the controversy to the International Court of Justice is accompanied by separate statements on the position of the respective Ministers of Foreign Affairs in resorting to the Court, Honduras "basing its stand on the fact that the Arbitral Award is in force and unassailable," and maintaining that the failure of Nicaragua to comply with the arbitral decision constituted, under Article 36 of the Statute of the Court, a breach of an international obligation; and Nicaragua presenting grounds for impugning the validity of the award and maintaining that its boundaries with Honduras "continue in the same legal status as before the issuance of the above-mentioned Arbitral Award."

C. G. FENWICK

⁶ A survey of the development of the controversy, with references to documents, may be found in Ireland, *Boundaries, Possessions, and Conflicts in Central and North America and the Caribbean* 128 ff. (1938).

⁷ *Acta de la Sesión Extraordinaria*, cited in note 1 above.

NOTES AND COMMENTS

PROFESSOR KRYLOV AND SOVIET TREATIES

In September, 1956, work was begun at the Hoover Institute and Library of Stanford University on a study of "The Soviet Government as a Treaty Partner, 1917-1952." The study was planned to take approximately two years, and was expected to lead to the publication of two volumes in the Hoover Library Documentary Series. Direction of the study was entrusted to Robert M. Slusser and Jan F. Triska.

The study is still far from completion and has not yet published any of its findings. Nevertheless, it has already attracted a certain amount of attention. In March, 1957, fairly extensive accounts based on an interview with the staff appeared in the *New York Times*¹ and the *Boston Globe*.² These were followed by a number of shorter references in other papers.³ On April 22, an analysis based on the newspaper reports was broadcast by the United Press⁴ and this in turn led to a heated criticism of the study by a leading Soviet scholar on international law, Professor S. Krylov of Moscow State University. Professor Krylov's criticism took the form of an article in *Izvestiia* entitled "Shifting the Blame."⁵

As frequently happens when information passes from one person to another, distortions and misinterpretations have gradually crept into these reports on the Soviet treaty project. Unfortunately, those working on the study have never had an opportunity to see or edit the reports before they were published. In a number of cases the information given has been inaccurate and misleading. The result is that the study which Professor Krylov criticized bears little resemblance to the one which is actually being carried out. Under these circumstances it seems desirable to attempt to set the record straight by a brief analysis of his article.

Professor Krylov's criticism of the treaty study can be summarized as follows: (1) The admittedly fairly extensive work done so far by the treaty study in examining Soviet treaties has been "superfluous," since the Soviet Government has never engaged in secret diplomacy, while "the treaties and agreements which it has concluded are no secret to anyone." (2) Furthermore, there is no need to investigate the record of Soviet performance of its treaty obligations, since the Soviet Government from the beginning "has accurately and loyally observed the international obliga-

¹ N. Y. Times, March 31, 1957.

² Boston Globe, March 31, 1957.

³ For example, the San Francisco Examiner, April 3, 1957, and the Chicago Tribune, April 23, 1957.

⁴ United Press radio commentary by Leroy Pope, April 22, 1957.

⁵ "S bol'noi golovy na zdorovuiu," *Izvestiia*, May 26, 1957, p. 5; English translation annexed to the present note, at p. 771 *infra*. A summary of Professor Krylov's article was broadcast by Radio Moscow on May 28. There is a translation, under the title "The guilty accuse the innocent," in 9 Current Digest of the Soviet Press 22 (No. 21).

tions which it has assumed." (3) The real purpose of the study, therefore, must be to divert public attention from (alleged) violations by the United States of its treaty obligations by raising a hue and cry over (alleged) Soviet misdeeds.

1. Concerning Professor Krylov's first point, the writers can only say that they wish it were true. At the time the study was undertaken it was assumed that it would be a comparatively easy task to assemble in one place the basic information needed on the treaties and agreements entered into by the Soviet Government. Instead, it was discovered that before starting to study the treaties it was necessary to hunt out the basic data concerning them from a wide range of sources. A very considerable number of well-documented Soviet treaties, including some of particular significance, have never been published in the official Soviet treaty series,⁶ while others are referred to in that source only by title and date, so that their text must be sought elsewhere.

Furthermore, the methods of secret diplomacy, which Professor Krylov states the Soviet Government has always "resolutely rejected," have in reality been used by it repeatedly since the early days of the Soviet regime, a fact which can readily be ascertained from Soviet sources. An early example is the special supplement to the Peace Treaty with the non-Soviet Government of Georgia signed on May 7, 1920, in which the Georgian Government, under Soviet pressure, agreed to give the Georgian Communist Party full freedom of action without the threat of "judicial or administrative repression." After the fall of the Georgian Government—a fall to a large extent brought about by that very Communist Party to which it accorded immunity in the secretly negotiated agreement—the Soviet Government published the full text of the secret supplement in its official treaty series.⁷

Later on, unfortunately, the Soviet Government abandoned such uncompromising honesty as inexpedient, but it did not give up the practice of secret diplomacy. To the best of the writers' knowledge it has not yet published, for example, the texts of the secret agreements which it concluded with the Government of Nazi Germany during the period between August, 1939, and June, 1941. Now that V. M. Molotov, one of the principal negotiators of those agreements, has been officially censured for having "hampered in every way" the implementation of measures "intended to ease international tension and promote universal peace,"⁸ it is to be hoped that Soviet scholars will be permitted to join their colleagues in

⁶ *Sbornik deistvuiushchikh dogovorov, soglashenii i konventsii, zakliuchennykh SSSR s inostrannymi gosudarstvami*, Moscow, Gosudarstvennoe izdatel'stvo politicheskoi literatury, 1924-. At present sixteen volumes of the *Sbornik* have been issued. The *Sbornik* for the U.S.S.R. was preceded by a series for the RSFSR, of which five volumes appeared between 1921 and 1923. These sources are hereinafter designated *Sbornik RSFSR* and *Sbornik SSSR*.

⁷ For the peace treaty with the Georgian Democratic Republic see 1 *Sbornik RSFSR* 27-34. For the special secret supplement see 3 *Sbornik RSFSR* 295.

⁸ Resolution of the plenary meeting of the Central Committee of the Communist Party of the Soviet Union, June 29, 1957. *N. Y. Times*, July 4, 1957, p. 2.

other countries in making a full and objective study of these secret negotiations and agreements.

As the result of this situation, it was found necessary to prepare an exhaustive card file of Soviet treaties, showing source references for each treaty and basic data on such information as ratification, denunciation, extension, etc. It is planned to publish this information in the form of a "Calendar of Soviet Treaties."

2. Professor Krylov's second contention, that the Soviet Government has always "accurately and loyally observed the international obligations which it has assumed," is equally untenable. V. I. Lenin, leader and founder of the Soviet state, was more candid when he stated, with regard to Soviet obligations under the Treaty of Brest-Litovsk:

Yes, of course, we are violating the treaty, we have already violated it thirty or forty times. Only children could fail to understand that in such an epoch, when a long, agonizing period of liberation ensues . . . only children could fail to understand that here there must be a lengthy, wary struggle.⁹

In 1939 the Red Army occupied half the territory of Poland, a state with which the Soviet Union had a Pact of Non-Aggression which it had solemnly reaffirmed less than twelve months before the invasion.¹⁰

In August, 1935, the Soviet Union concluded a Treaty of Friendship and Alliance with the Chinese Republic¹¹ in which it pledged itself to respect the sovereignty and territorial integrity of China and to render it "all possible economic assistance in the postwar period, with a view to lightening and speeding up" its national rehabilitation. Despite this solemn pledge the Soviet armies in Manchuria after the war dismantled and removed to the Soviet Union millions of dollars' worth of industrial equipment belonging to China. Even in Communist China an official protest against this Soviet action has been made.¹²

These examples—and it would be easy to add to their number—are cited not for the purpose of framing an indictment of Soviet conduct, but simply to demonstrate that an investigation of the actions of the Soviet Government under its treaty obligations need not necessarily be, in Professor Krylov's term, "superfluous." It might prove difficult for him to make a convinc-

⁹ Lenin, V. I., "Doklad o voine i mire 7 marta [1918 g.]," 22 *Sochineniia* 327 (2nd ed., 1929).

¹⁰ For the Non-Aggression Pact, dated July 25, 1932, see 7 *Sbornik SSSR* 12-15. A joint Polish-Soviet statement reaffirming the validity of the pact and other existing Polish-Soviet treaties and guaranteeing "the inviolability of peaceful relations between the two states" was signed on Nov. 26, 1938. It will be found in *Official Documents concerning Polish-German and Polish-Soviet Relations, 1933-1939*, at 181-182 (N. Y., 1939). It has not been published in the official Soviet treaty series.

¹¹ Text in 14 *Dept. of State Bulletin* 201 (1946); 40 *A.J.I.L. Supp.* 51 (1946); also in Harriet L. Moore, *Soviet Far Eastern Policy, 1931-1945*, at 265-277 (1945). The treaty is cited but not published in 11 *Sbornik SSSR* 198.

¹² General Lung Yun, vice chairman of the National Defense Committee of Communist China, was quoted by the New China News Agency on June 16, 1957, as having raised this question and others in criticism of Soviet actions vis-à-vis China. *N. Y. Times*, June 24, 1957, p. 1.

ing case for the thesis that in these and similar actions the Soviet Government was guided by a scrupulous regard for the principle, *Pacta sunt servanda*.

Interestingly enough, Soviet international lawyers over a period of years have been by no means unanimous in their support of this principle as it applies to treaties entered into by the Government of Tsarist Russia. Of a considerable group of authors on this subject, let us quote the two most prominent ones: Yevgenii B. Pashukanis (condemned as an "enemy of the people" in 1937, but posthumously rehabilitated for his "positive role in the development of Soviet legal science" in 1956);¹³ and Yevgenii A. Korovin, former member of the American Society of International Law and contributor to this JOURNAL,¹⁴ who has been writing on the subject of Soviet treaties ever since the Bolshevik Revolution. On this subject Pashukanis¹⁵ simply quotes the memorandum of the Delegation of the R.S.F.S.R. and Union Republics presented to the Genoa Conference on April 20, 1922:

If the Soviet power has refused to accept the obligations of previous governments or to satisfy the claims of persons who have suffered losses from domestic political measures, it is not because in general it is unable or disinclined to meet obligations, but for reasons of personal and political necessity. The revolution of 1917, which completely destroyed all the old economic, social and political relations and replaced the old society with a new one, transferring the state power in Russia to a new social class on the strength of the sovereignty of the people which had revolted, thereby severed the succession of civil obligations which were a component part of the economic relations of the society which had disappeared, and which passed away along with it.

Korovin at first disagreed. In 1917 he defended the *pacta sunt servanda* principle vehemently; those who considered Tsarist treaties no longer valid, he wrote, were "ignorant" of international law.

It is a theoretically and universally recognized principle of international law that the person of a state as the subject of international relations remains unchanged, despite changes which may occur in the organization of the state.¹⁶

An attempt to sunder existing international treaties would be "not only an unlawful act but a profoundly immoral one as well."¹⁷ And even if legal and moral conditions should be neglected, it must be recognized, he argued, that "for reasons of simple political expediency" unilateral repudiation of treaties of former governments "would be both dangerous and disadvantageous for Russia."¹⁸

¹³ Sovetskoe gosudarstvo i pravo, No. 6, 1956, at 3-11, quoted in John N. Hazard's editorial, "Pashukanis is No Traitor," 51 A.J.I.L. 385-388 (1957).

¹⁴ "The Soviet Treaties and International Law," 22 A.J.I.L. 753 (1928); "The Second World War and International Law," 40 A.J.I.L. 742 (1946).

¹⁵ "Dogovor mezhdunarodnyi," Entsiklopediia gosudarstva i prava 981-982 (Moscow, 1925).

¹⁶ Korovin, Yevgenii A., Vneshniaia politika obnovlennoi Rossii 9 (Moscow, 1917).

¹⁷ *Ibid.* 10.

¹⁸ *Ibid.* 11-12.

Later, however, Korovin changed his mind. As the practice of the new Bolshevik regime changed, so did Korovin's theory on treaties. The *pacta sunt servanda* principle, which he had advocated as the only principle valid in spite of changes in government, was now on the index. In an article on the *rebus sic stantibus* clause¹⁹ he wrote:

As a result of the inexorability of fate, all the legal relations which rest on the assumption of social community of the identity of the state systems of the contracting parties collapse, and not only is the violation of a specific group of former treaty obligations justified, but it would be genuinely wrong that they would be observed "contrary to reason and in defiance of nature."²⁰

Many other Soviet authors on international law besides Pashukanis and Korovin (Shtein, Kotliarevskii, Sabanin, Durdenevskii, etc.), in unison with them, denied the principle of *pacta sunt servanda* in this context, but it is hardly necessary to quote them as well, since Professor Krylov wrote on Soviet treaties²¹ at the same time they did.

The principle of *pacta sunt servanda*, then, has not always been "an organic attribute of the very nature" of the Soviet state; other "principles," such as "political necessity" and unilateral "legally justified treaty violation," have at times interfered.

3. Finally, with regard to Professor Krylov's third point—his claim that the real purpose of the study of "The Soviet Government as a Treaty Partner" is to divert attention from alleged violations of treaty obligations by the United States—we do not consider it our task to defend United States foreign policy, just as we do not consider it our task to condemn Soviet foreign policy. We are simply attempting to establish and analyze the facts insofar as they can be ascertained, for the purpose of understanding our subject.

As an example of what we believe should be avoided in a study of this kind, it would be difficult to find better illustrations than the charges leveled by Professor Krylov against the United States. It is all too easy to frame such indictments of a nation's conduct if one presents the facts tendentiously and without regard to their historical, legal and political context. The actions of the Soviet Union as they affect its treaty obligations, like those of any other nation, must be studied in a spirit of dispassionate objectivity and fullness. It was in that spirit that the study of The Soviet Government as a Treaty Partner was established, and it is in that spirit that we intend to complete the task.

ROBERT M. SLUSSER and JAN F. TRISKA

¹⁹ "Ogovorka rebus sic stantibus v mezhdunarodnoi praktike R.S.F.S.R.," *Sovetskoe pravo*, No. 3, 1923, at 53 *et seq.*

²⁰ *Ibid.* 55-56.

²¹ For example, "Optatsii i plebistsit i nachalo samoopredeleniia v sovetskikh mezhdunarodnykh dogovorakh," *Sovetskoe pravo*, No. 2, 1923, at 43-55, and "Eksterritorial'noe (vnezemel'noe) deistvie sovetskogo prava v zapadno-yevropeiskoi sudebnoi praktike," *ibid.*, No. 3, 1925, at 37-46.

ANNEX

"*Shifting the Blame*," by S. Krylov, Professor of International Law at Moscow State University. *Izvestiia*, May 26, 1957, p. 5.¹

Treaties must be observed—"Pacta sunt servanda"—is one of the basic principles of international law. In international law this principle is regarded as an axiom, as something taken for granted. Among international lawyers of various countries and differing political views there is not the slightest difference of opinion concerning the fact that this principle is the basis of all international relations and derives from the very nature of intercourse among states. As a matter of fact, when this principle lapses, international law is replaced by the law of force.

From the very first days of its existence the Soviet Union, the foreign policy of which is firmly based on the Leninist principle of the peaceful co-existence of states with varying social systems, has accurately and loyally observed the international obligations which it has assumed. The scrupulous observance by the Soviet Union of the treaties and agreements which its representatives have signed is recognized even by those who are unfavorably inclined towards it. The principle "*Pacta sunt servanda*" is an organic attribute of the very nature of our socialist state.

Recently, however, it came about that this obvious truth was evidently displeasing to someone. At the initiative of former U.S. President Herbert Hoover a pile of dollars was collected and with them was hired a group of scholars at Stanford University to prove the opposite. According to United Press Correspondent Pope, the Stanford legal experts set about their task boldly and have now "almost completed the detailed examination of Soviet diplomacy—approximately 700 treaties which the Bolshevik government negotiated during the forty years of its existence."

It must be admitted that a considerable amount of work has been done. Frankly, however, the work has been superfluous. Ever since its first steps in the international arena the Soviet Union has resolutely rejected the methods of secret diplomacy. The treaties and agreements which it has concluded are no secret to anyone. But of course, it was not for the purpose of establishing this already known truth that Hoover disbursed dollars to the scholars of Stanford University, in which, by the way, he himself was enrolled as a scholar many years ago.

What, then, is the significance of the Sisyphean labor in which the people at Stanford are engaged?

To answer this question, unfortunately, we shall have to turn to a province which is very remote from science. Everyone is familiar with the old ruse of the thief who cries, "Stop thief!" It is just this unsophisticated ruse to which the Stanford lackeys with degrees have resorted in order to whitewash the unseemly deeds of their masters—the ruling circles of the United States—who are following a policy of negotiating "from positions of strength" in international relations.

¹ A summary of Professor Krylov's article was broadcast by Radio Moscow on May 28, 1957.

But it is impossible to get very far in this game of shifting the blame. Even a person who is uninitiated in the mysteries of jurisprudence can see clearly that there is nothing in common between the principle that treaties must be observed and the policy of negotiating "from positions of strength," that one excludes the other. For the sake of clarity let us cite only a few examples.

In 1933 normal diplomatic relations were established between the USSR and the USA. Under the Litvinov-Roosevelt agreement there was assumed among other things the obligation to forbid the establishment or maintenance on either state's territory of armed organizations pursuing aims hostile to the other party. Nevertheless, the so-called Mutual Security Law was passed in the USA on October 10, 1951, and was thereafter approved repeatedly. This law provides for recruiting armed units and groups of spies and saboteurs of "any selected personnel" from among the emigrants and deserters from the USSR and the nations of people's democracy for purposes hostile to these states. The law provides for the financing of such groups and detachments.

Despite the reiterated protests of the Soviet Union against this flagrant violation of the 1933 Litvinov-Roosevelt agreement, the ruling circles of the USA continue as before to carry out subversive actions which contradict international law, which contradict the principle of the observance of international treaties. The counter-revolutionary putsch in Hungary showed the whole world how the law "On guaranteeing mutual security" looks in practice.

An outrageous violation of the obligations which the United States of America had assumed was the predatory seizure of the Island of Taiwan, an indivisible part of China. In the Cairo Declaration of 1943 and the Potsdam Declaration of 1945 the USA unconditionally recognized China's rights to this primordial Chinese island. However, this did not prevent them from seizing the Island of Taiwan in 1950, with the help of the Kuomintang clique, or from retaining control over the island to this day. Not only, therefore, has the United States violated the principle that international treaties must be observed, but it has also perpetrated still another crime against international law—aggression.

Gross violation of the principle "*Pacta sunt servanda*" has become habitual in the international practice of the USA. It is sufficient to mention a whole series of violations of international treaties, especially the decisions concerning Germany which were reached at the conferences in Moscow in 1943, Teheran in 1943, Yalta in 1945, and Potsdam in 1945, or the declarations of Cairo, Yalta and Potsdam on a postwar settlement in the Far East.

The imperialist circles of the USA have systematically violated the principle of observing international treaties in regard to the United Nations. Notwithstanding the fact that the USA is a signatory of the UN Charter, it has shamelessly trampled on it by its actions. This appears in the creation of numerous aggressive blocs such as NATO and SEATO, in the stubborn opposition to the restoration of the legitimate rights of

the Chinese People's Republic in the UN, and in many other things. As is known, the UN Charter forbids the members of that organization not only to resort to force but also to threaten the use of force. The ruling circles of the USA, however, carrying out a policy of negotiating "from positions of strength," a policy of approaching "the brink of war," have made extensive use of the threat of force in the form of military demonstrations, diplomatic blackmail, etc. The threat of force also underlies to a considerable extent the colonializing "Eisenhower Doctrine." This is eloquently attested to by the reactionary conspiracy in Jordan and the visit of the American Sixth Fleet to Lebanon.

Such are the facts. For an honest scholar, as well as for the man in the street, they are far more convincing than the arguments of the Stanford legal scholars, supported by Mr. Hoover's dollars.

INTER-AMERICAN BAR ASSOCIATION CONFERENCE IN BUENOS AIRES

The Tenth Conference of the Inter-American Bar Association was held in Buenos Aires, Argentina, from November 14 to 24, 1957. The host for the Conference was the Federación Argentina de Colegios de Abogados. The Organizing Committee for the Conference was composed of Dr. Eduardo B. Busso, Chairman, Mauricio A. Ottolenghi and Juan Carlos Palacios

The sessions of the Conference were devoted to considering reports presented by the 15 committees of the association, covering public and private international law, constitutional law, civil law, municipal law, commercial law, civil and commercial procedure, criminal law and procedure, administrative law and procedure, fiscal law, social and economic law, legal education, legal documentation, natural resources, and activities of lawyers.

At the opening session on November 14, the Conference was addressed by General Pedro Aramburú, President of the Republic of Argentina, the Honorable Robert G. Storey, past President of the Inter-American Bar Association, and Mr. Charles S. Rhyne, President of the American Bar Association, who responded in behalf of the English-speaking delegates to the addresses of welcome.

Delegates from the United States prepared papers for the Conference as follows:

Committee I. Public International Law:

"Consideration of report on the juridical status of the continental shelf," by Henry F. Holland, New York, and Professor William W. Bishop, Jr., University of Michigan.

"Principles of law governing use of international rivers," by John G. Laylin, Washington, D. C.

Committee II. Private International Law:

"The Inter-American Juridical Committee and the Revision of the Bustamante Code; consideration of the study to be made by the special committee," by Professor William S. Barnes, Harvard Law School, Cambridge, Massachusetts.

"Consideration of report regarding comments of member associations on comparative study of treaties or laws in existence in the American States concerning the recognition and execution of foreign judgments (Sao Paulo Conference Resolution)," by Mrs. Grace Brown, Detroit, Michigan.

"Judicial Assistance in administration of justice—recognition and proof of foreign law. Study of conclusions and propositions submitted by the Inter-American Juridical Committee of Rio de Janeiro in their report of September 23, 1952, on international co-operation in judicial procedures," by Harry LeRoy Jones, Special Assistant to the Attorney General, U. S. Department of Justice.

"Uniform legislation versus international conventions as a method of unification of private international law," by Professor Kurt Nadelmann, Harvard Law School, Cambridge, Massachusetts.

Committee V. Civil Law:

"Comparative Study of the Laws of the Americas on the Status of Children in Cases of Separation or Divorce of Parents," by Laura H. Dale, Washington, D. C.

"Status of Children in cases of separation or divorce of parents," by Cecil Dacey, Michigan.

"Legal principles regarding inheritance of property in the Americas," by Professor Leonard Oppenheim, Tulane University, New Orleans, Louisiana.

"The significance of the Washington (1956) A.I.P.P.I. Congress to Western Hemisphere Countries," by W. Frederick Weigester, Attorney, U. S. Department of Justice, and Cyril D. Pearson, Trademark Counsel for Standard Oil Company, New York.

Committee VI. Civil and Commercial Procedure:

"Legal requirements regarding publicity of court proceedings, including taking of photographs, radio and television," by Judge Lester Kramer, New Jersey.

"Judicial statistics. Exchange of conclusions," by Glenn R. Winters, Chicago, Illinois.

"Unification of legislation regarding intervention of third parties in civil proceedings," by Irwin Ward Steinman, Alexandria, Louisiana.

Committee VII. Commercial Law:

"Unification and simplification of rules governing the use of powers of attorney issued abroad: (a) through uniform legislation and (b) through revision of the Washington Protocol of 1940," by Phanor J. Eder, New York City.

"Protection of the minority shareholders in corporations and other stock companies," by Professor Jan Charnatz, Tulane University, New Orleans, Louisiana.

"Consideration of report of special committee dealing with a draft on uniform legislation limiting liability of maritime carrier," by William L. Standard, New York.

Further light is reflected on the scope of Clause 14 by the Fifth Amendment. That Amendment which was adopted shortly after the Constitution reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces*, or in the Militia, when in actual service in time of War or public danger;" (Emphasis added.)

Since the exception in this Amendment for "cases arising in the land or naval forces" was undoubtedly designed to correlate with the power granted Congress to provide for the "Government and Regulation" of the armed services, it is a persuasive and reliable indication that the authority conferred by Clause 14 does not encompass persons who cannot fairly be said to be "in" the military service.

Even if it were possible, we need not attempt here to precisely define the boundary between "civilians" and members of the "land and naval Forces." We recognize that there might be circumstances where a person could be "in" the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform. But the wives, children and other dependents of servicemen cannot be placed in that category, even though they may be accompanying a serviceman abroad at Government expense and receiving other benefits from the Government. We have no difficulty in saying that such persons do not lose their civilian status and their right to a civilian trial because the Government helps them live as members of a soldier's family.

The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. The idea that the relatives of soldiers could be denied a jury trial in a court of law and instead be tried by court-martial under the guise of regulating the armed forces would have seemed incredible to those men, in whose lifetime the right of the military to try *soldiers* for any offenses in time of peace had only been grudgingly conceded. The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders. They were familiar with the history of Seventeenth Century England, where Charles I tried to govern through the army and without Parliament. During this attempt, contrary to the Common Law, he used courts-martial to try soldiers for certain non-military offenses. This court-martialing of soldiers in peacetime evoked strong protests from Parliament. The reign of Charles I was followed by the rigorous military rule of Oliver Cromwell. Later, James II used the Army in his fight against Parliament and the people. He promulgated Articles of War (strangely enough relied on in the Government's brief) authorizing the trial of soldiers for non-military crimes by courts-martial. This action hastened the revolution that brought William and Mary to the throne upon their agreement to abide by a Bill of Rights which, among other things, protected the right of trial by jury. It was against this general background that two of the greatest English jurists, Lord Chief Justice Hale and Sir William Blackstone—men who exerted considerable influence on the Founders—expressed sharp hostility to any expansion of the jurisdiction of military courts. . . .

The generation that adopted the Constitution did not distrust the military because of past history alone. Within their own lives they had seen royal governors sometimes resort to military rule. British troops were quartered in Boston at various times from 1768 until the outbreak of the Revolutionary War to support unpopular royal governors and to intimidate the local populace. The trial of *soldiers* by courts-martial and the interference of the military with the civil courts aroused great anxiety and antagonism not only in Massachusetts but throughout the colonies. . . .

Colonials had also seen the right to trial by jury subverted by acts of Parliament which authorized courts of admiralty to try alleged violation of the unpopular "Molasses" and "Navigation" Acts. This gave the admiralty courts jurisdiction over offenses historically triable only by a jury in a court of law and aroused great resentment throughout the colonies. As early as 1765 delegates from nine colonies meeting in New York asserted in a "Declaration of Rights" that trial by jury was the "inherent and invaluable" right of every citizen in the colonies.

With this background it is not surprising that the Declaration of Independence protested that George III had "affected to render the Military independent of and superior to the Civil Power" and that Americans had been deprived in many cases of "the benefits of Trial by Jury." And those who adopted the Constitution embodied their profound fear and distrust of military power, as well as their determination to protect trial by jury, in the Constitution and its Amendments. Perhaps they were aware that memories fade and hoped that in this way they could keep the people of this Nation from having to fight again and again the same old battles for individual freedom.

In light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were "necessary and proper" for the regulation of the "land and naval Forces." Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority. The Constitution does not say that Congress can regulate "the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces." There is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over non-military America.

On several occasions this Court has been faced with an attempted expansion of the jurisdiction of military courts. *Ex parte Milligan*, 4 Wall. 2, one of the great landmarks in this Court's history, held that military authorities were without power to try civilians not in the military or naval service by declaring martial law in an area where the civil administration was not deposed and the courts were not closed. . . . In *Duncan v. Kahanamoku*, 327 U. S. 304, the Court reasserted the principles enunciated in *Ex parte Milligan* and reaffirmed the tradition of military subordination to civil authorities and institutions. It refused to sanction the military trial of civilians in Hawaii

during wartime despite government claims that the needs of defense made martial law imperative.

Just last Term, this Court held in *United States ex rel. Toth v. Quarles*, 350 U. S. 11, that military courts could not constitutionally try a discharged serviceman for an offense which he had allegedly committed while in the armed forces. It was decided (1) that since Toth was a civilian he could not be tried by military court-martial, and (2) that since he was charged with murder, a "crime" in the constitutional sense, he was entitled to indictment by a grand jury, jury trial, and the other protections contained in Art. III, § 2 and the Fifth, Sixth, and Eighth Amendments. The Court pointed out that trial by civilian courts was the rule for persons who were not members of the armed forces.

There are no supportable grounds upon which to distinguish the *Toth* case from the present cases. Toth, Mrs. Covert, and Mrs. Smith were all civilians. All three were American citizens. All three were tried for murder. All three alleged crimes were committed in a foreign country. The only differences were: (1) Toth was an ex-serviceman while they were wives of soldiers; (2) Toth was arrested in the United States while they were seized in foreign countries. If anything, Toth had closer connection with the military than the two women for his crime was committed while he was actually serving in the Air Force. Mrs. Covert and Mrs. Smith had never been members of the army, had never been employed by the army, had never served in the army in any capacity. The Government appropriately argued in *Toth* that the constitutional basis for court-martialing him was clearer than for court-martialing wives who are accompanying their husbands abroad. Certainly Toth's conduct as a soldier bears a closer relation to the maintenance of order and discipline in the armed forces than the conduct of these wives. The fact that Toth was arrested here while the wives were arrested in foreign countries is material only if constitutional safeguards do not shield a citizen abroad when the Government exercises its power over him. As we have said before, such a view of the Constitution is erroneous. The mere fact that these women had gone overseas with their husbands should not reduce the protection the Constitution gives them.

The *Milligan*, *Duncan* and *Toth* cases recognized and manifested the deeply rooted and ancient opposition in this country to the extension of military control over civilians. In each instance an effort to expand the jurisdiction of military courts to civilians was repulsed.

There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces "in the field" during *time of war*. To the extent that these cases can be justified, insofar as they involved trial of persons who were not "members" of the armed forces, they must rest on the Government's "war powers." In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefield. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules. But neither Japan nor Great Britain could properly be said to be an area where active hostilities were under way at the time Mrs. Smith and Mrs. Covert committed their offenses or at the time they were tried.

The Government urges that the concept "in the field" should be broadened to reach dependents accompanying the military forces

overseas under the conditions of world tension which exist at the present time. It points out how the "war powers" include authority to prepare defenses and to establish our military forces in defensive posture about the world. While we recognize that the "war powers" of the Congress and the Executive are broad, we reject the Government's argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are under way. The exigencies which have required military rule on the battlefield are not present in areas where no conflict exists. Military trial of civilians "in the field" is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights. We agree with Colonel Winthrop, an expert on military jurisdiction, who declared: "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*" (Emphasis not supplied.)

As this Court stated in *United States ex rel. Toth v. Quarles*, 350 U. S. 11, the business of soldiers is to fight and prepare to fight wars, not to try civilians for their alleged crimes. Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks. Because of its very nature and purpose the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts.

Courts-martial are typically *ad hoc* bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of "command influence." In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings—in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.

We recognize that a number of improvements have been made in military justice recently by engrafting more and more of the methods of civilian courts on courts-martial. In large part these ameliorations stem from the reaction of civilians, who were inducted during the two World Wars, to their experience with military justice. Notwithstanding the recent reforms, military trial does not give an accused the same protection which exists in the civil courts. Looming far above all other deficiencies of the military trial, of course, are the absence of trial by jury before an independent judge after an indictment by a grand jury. Moreover the reforms are merely statutory; Congress—and perhaps the President—can reinstate former practices, subject to any limitations imposed by the Constitution, whenever it desires. As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials.

It must be emphasized that every person who comes within the jurisdiction of courts-martial is subject to military law—law that is substantially different from the law which governs civilian society. Military law is, in many respects, harsh law which is frequently

cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice. Moreover, it has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war. In any event, Congress has given the President broad discretion to provide the rules governing military trials. For example, in these very cases a technical manual issued under the President's name with regard to the defense of insanity in military trials was of critical importance in the convictions of Mrs. Covert and Mrs. Smith. If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

In summary, "it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." In part this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual.

It is urged that the expansion of military jurisdiction over civilians claimed here is only slight, and that the practical necessity for it is very great. The attitude appears to be that a slight encroachment on the Bill of Rights and other safeguards in the Constitution need cause little concern. But to hold that these wives could be tried by the military would be a tempting precedent. Slight encroachments create new boundaries from which legions of power can seek new territory to capture. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Moreover we cannot consider this encroachment a slight one. Throughout history many transgressions by the military have been called "slight" and have been justified as "reasonable" in light of the "uniqueness" of the times. We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military.

We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution. The country has remained true to that faith for almost one hundred seventy years. Perhaps no group in the Nation has been truer than military men themselves. Unlike the soldiers of many other nations, they have

been content to perform their military duties in defense of the Nation in every period of need and to perform those duties well without attempting to usurp power which is not theirs under our system of constitutional government

Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny. And under our Constitution courts of law alone are given power to try civilians for their offenses against the United States. The philosophy expressed by Lord Coke, speaking long ago from a wealth of experience, is still timely:

"God send me never to live under the Law of Conveniency or Discretion. Shall the Souldier and Justice Sit on one Bench, the Trumpet will not let the Cryer speak in *Westminster-Hall*." . .

Status of Forces Agreement with Japan—offenses in the performance of official duty—waiver of jurisdiction granted by Japan not violative of Constitution and statutes

GIRARD *v.* WILSON ET AL. 354 U.S. 524.

United States Supreme Court, July 11, 1957. *Per Curiam*.

Petition for *habeas corpus* was filed by a U. S. Soldier stationed in Japan against the Secretary of Defense and others, to prevent his being turned over to Japanese authorities for trial on the grounds that Japan had no jurisdiction over him and that his Constitutional rights would be violated if he were turned over. The District Court held that delivery of the petitioner to the Japanese authorities would violate his Constitutional rights but refused to issue the writ. 152 F. Supp. 21 (U. S. Dist. Ct., D.C. June 22, 1957, McGarraghy, J.). The Supreme Court affirmed the refusal of the writ but reversed the finding that delivery of the petitioner would violate his Constitutional rights. The opinion,¹ *Per Curiam*, follows in full:

Japan and the United States became involved in a controversy whether the respondent Girard should be tried by a Japanese court for causing the death of a Japanese woman. The basis for the dispute between the two Governments fully appears in the affidavit of Robert Dechert, General Counsel of the Department of Defense, an exhibit to a Government motion in the court below, and the joint statement of Secretary of State John Foster Dulles and Secretary of Defense Charles E. Wilson, printed as appendices to this opinion. [Appendices omitted.]

Girard, a Specialist Third Class in the United States Army, was engaged on January 30, 1957, with members of his cavalry regiment in a small unit exercise at Camp Weir range area, Japan. Japanese civilians were present in the area retrieving expended cartridge cases. Girard and another Specialist Third Class were ordered to guard a machine gun and some items of clothing that had been left nearby. Girard had a grenade launcher on his rifle. He placed an expended 30-caliber cartridge case in the grenade launcher and projected it by firing a blank. The expended cartridge case penetrated the back of a Japanese woman gathering expended cartridge cases and caused her death.

¹ Footnotes omitted. •

The United States ultimately notified Japan that Girard would be delivered to the Japanese authorities for trial. Thereafter, Japan indicted him for causing death by wounding. Girard sought a writ of habeas corpus in the United States District Court for the District of Columbia. The writ was denied, but Girard was granted declaratory relief and an injunction against his delivery to the Japanese authorities. 152 F. Supp. 21. The petitioners appealed to the Court of Appeals for the District of Columbia, and without awaiting action by that court on the appeal, invoked the jurisdiction of this Court under 28 U.S.C. § 1254 (1). Girard filed a cross-petition for certiorari to review the denial of the writ of habeas corpus. We granted both petitions. Supreme Court Rule 20; 354 U.S. 928.

A Security Treaty between Japan and the United States, signed September 8, 1951, was ratified by the Senate on March 20, 1952, and proclaimed by the President effective April 28, 1952. Article III of the Treaty authorized the making of Administrative Agreements between the two Governments concerning "[t]he conditions which shall govern the disposition of armed forces of the United States of America in and about Japan. . . ." Expressly acting under this provision, the two Nations, on February 28, 1952, signed an Administrative Agreement covering, among other matters, the jurisdiction of the United States over offenses committed in Japan by members of the United States armed forces, and providing that jurisdiction in any case might be waived by the United States. This agreement became effective on the same date as the Security Treaty (April 28, 1952) and was considered by the Senate before consent was given to the Treaty.

Article XVII, paragraph 1, of the Administrative Agreement provided that upon the coming into effect of the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces," signed June 19, 1951, the United States would conclude with Japan an agreement on criminal jurisdiction similar to the corresponding provisions of the NATO Agreement. The NATO Agreement became effective August 23, 1953, and the United States and Japan signed on September 29, 1953, effective October 29, 1953, a Protocol Agreement pursuant to the covenant in paragraph 1 of Article XVII.

Paragraph 3 of Article XVII, as amended by the Protocol, dealt with criminal offenses in violation of the laws of both Nations and provided:

"3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

"(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to

"(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;

"(i) offenses arising out of any act or omission done in the performance of official duty.

"(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

"(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request

from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

Article XXVI of the Administrative Agreement established a Joint Committee of representatives of the United States and Japan to consult on all matters requiring mutual consultation regarding the implementation of the Agreement; and provided that if the Committee "... is unable to resolve any matter, it shall refer that matter to the respective Governments for further consideration through appropriate channels."

In the light of the Senate's ratification of the Security Treaty after consideration of the Administrative Agreement, which had already been signed, and its subsequent ratification of the NATO Agreement, with knowledge of the commitment to Japan under the Administrative Agreement, we are satisfied that the approval of Article III of the Security Treaty authorized the making of the Administrative Agreement and the subsequent Protocol embodying the NATO Agreement provisions governing jurisdiction to try criminal offenses.

The United States claimed the right to try Girard upon the ground that his act, as certified by his commanding officer, was "done in the performance of official duty" and therefore the United States had primary jurisdiction. Japan insisted that it had proof that Girard's action was without the scope of his official duty and therefore that Japan had the primary right to try him.

The Joint Committee, after prolonged deliberations, was unable to agree. The issue was referred to higher authority, which authorized the United States representatives on the Joint Committee to notify the appropriate Japanese authorities, in accordance with paragraph 3 (c) of the Protocol, that the United States had decided not to exercise, but to waive, whatever jurisdiction it might have in the case. The Secretary of State and the Secretary of Defense decided that this determination should be carried out. The President confirmed their joint conclusion.

A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction. *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 136. Japan's cession to the United States of jurisdiction to try American military personnel for conduct constituting an offense against the laws of both countries was conditioned by the covenant of Article XVII, section 3, paragraph (c) of the Protocol that

"... The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

The issue for our decision is therefore narrowed to the question whether, upon the record before us, the Constitution or legislation subsequent to the Security Treaty prohibited the carrying out of this provision authorized by the Treaty for waiver of the qualified jurisdiction granted by Japan. We find no constitutional or statutory barrier to the provision as applied here. In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches. . . .

Mr. Justice Douglas took no part in the consideration or decision of this case.

Treaties—invalidity of Senate “reservation” as law of the land—matter of “domestic concern” not part of treaty—Constitutional issue not decided

POWER AUTHORITY OF THE STATE OF NEW YORK *v.* FEDERAL POWER COMMISSION. 247 F. 2d. 538.

U. S. Ct. A., D. C. Circuit, June 20, 1957. Bazelon, Ct. J.

The New York Power Authority applied to the Federal Power Commission for a license to develop the U.S. share of Niagara River power under the 1950 treaty between the United States and Canada.¹ The Federal Power Commission denied the application on the ground that the “reservation” attached to the treaty by the Senate required an Act of Congress before the Commission could act, and that the “reservation” was binding as a part of the treaty under the supremacy clause. On review before the Court of Appeals of the District of Columbia, the order of the Federal Power Commission was set aside. Bazelon, Ct. J., delivered the opinion of the Court, in which Edgerton, C. J., joined. Bastian, Ct. J., dissented. The majority opinion² stated:

Petitioner, an agency of the State of New York, applied to the Federal Power Commission for a license to construct a power project to utilize all of the Niagara River water which, under the 1950 treaty between the United States and Canada, is available for American exploitation.

In consenting to the treaty, the Senate had attached the following “reservation”:

“The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States share of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress.” [1 U. S. T. 694, 699.]

The Commission dismissed petitioner’s application on Nov. 30, 1956, in an opinion and order declaring:

“In the absence of the treaty reservation we would act on the Power Authority’s application in accordance with the provisions of the Federal Power Act. But if we are to accept the injunction of the reservation as it stands, we would have no authority to consider the application of the Power Authority on its merits.

“Since the reservation here was intended by the Senate as part of the treaty and was intended to prevent our jurisdiction attaching to the water made available by the treaty, it is entirely authoritative with us as the supreme law of the land under Article VI of the Constitution. . . .

“We are without authority to issue a license for the redevelopment (Project No. 2216) proposed by the Power Authority of the State of New York.”

¹ 1 U.S. Treaties 694; T.I.A.S., No. 2130.

² Footnotes omitted.

An application for rehearing was denied on January 2, 1957, and petitioner brought this reviewing proceeding.

The parties agree that, if the reservation to the 1950 treaty is not "law of the land," the order should be set aside. Since the reservation did not have the concurrence of the House of Representatives, it is not "law of the land" by way of legislation. The question is whether it became "law of the land" as part of the treaty.

The Commission argues that the reservation is an effective part of the treaty because: (1) it was a condition of the Senate's consent to the ratification of the treaty; (2) the condition was sanctioned by the President, was "accepted" by Canada, and was included in the exchange of ratifications; and (3) it "thus became a part of the Treaty." Simple as this argument seems, we cannot agree with it.

The treaty was signed on behalf of the United States and Canada on Feb. 27, 1950. It defined the quantity of Niagara River water which was to be available for power purposes and provided that it "shall be divided equally between the United States of America and Canada." How each party was to exploit its share of the water was left for that party to decide.

In transmitting the treaty to the Senate on May 2, 1950, the President pointed out that the treaty did not determine how the United States was to exploit its share of the water. He said:

"... It is a question which we in the United States must settle under our own procedures and laws. It would not be appropriate either for this country or for Canada to require that an international agreement between them contain the solution of what is entirely a domestic problem."

The Foreign Relations Committee of the Senate agreed that the question was "domestic in nature" and "concerns the United States constitutional process alone." It recommended the reservation because, without it, "the redevelopment for power purposes would be governed by the Federal Power Act. The committee intends by the reservation to retain that power in the hands of Congress." The Senate accepted the committee's recommendation and consented to the ratification of the treaty with the reservation on Aug. 9, 1950.

Meanwhile, the Canadian Parliament had approved the treaty as signed, without the reservation. In a note on Aug. 17, 1950, the legal adviser of the Department of State called the attention of the Canadian Government to the Senate action saying:

"It appears that, while recognizing the subject matter of the reservation as domestic in nature and concerning the United States constitutional process alone, the Senate considered the reservation necessary in order to make certain that implementation of the treaty on the part of the United States would be made only by specifically authorized acts of Congress and would not be governed by the Federal Power Act."

A week later, without waiting for Canadian reaction to the reservation, the President ratified the treaty subject to the reservation. On Sept. 21, 1950, the Canadian Ambassador, replying to the State Department's note, advised that his Government accepted the reservation and would indicate its acceptance "by a statement to be included in the protocol of exchange of ratifications." Two weeks later, without resubmitting the treaty to Parliament for approval of the reserva-

tion, the Canadian Government ratified the treaty in the protocol, on Oct. 10, 1950. Canada inserted the following statement:

"Canada accepts the above-mentioned reservation because its provisions relate only to the internal application of the treaty within the United States and do not affect Canada's rights or obligations under the treaty."

The Canadian view that the reservation was of purely domestic concern to the United States and of no concern to Canada was shared, as we have shown, by the President, the Department of State and the Senate.

Unquestionably the Senate may condition its consent to a treaty upon a variation of its terms. The effect of such a "consent," by analogy to contract law, is to reject the offered treaty and to propose the variation as a counter-offer which will become a binding agreement only if accepted by the other party. But, if what the Senate seeks to add was implicit in the original offer, the purported "conditional acceptance" is an acceptance and the contract arises without a further acceptance by the other party being required. Restatement, Contracts §60, Comment a (1932). The disposition of the United States share of the water covered by this treaty was, even apart from the reservation, something "which we in the United States must settle under our own procedures and laws." The reservation, therefore, made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent. It was not a counter-offer requiring Canadian acceptance before the treaty could become effective. That Canada did "accept" the reservation does not change its character. The Canadian acceptance, moreover, was not so much an acceptance as a disclaimer of interest. It is of some significance in this regard that the Canadian Government, although it had submitted the original treaty to the Parliament for its approval, found it unnecessary to resubmit the treaty to Parliament after the reservation was inserted. Also significant is the fact that the President ratified the treaty with the reservation without even waiting for Canada to "accept."

A true reservation which becomes a part of a treaty is one which alters "the effect of the treaty in so far as it may apply in the relations of [the] state with the other state or states which may be parties to the treaty." Report of the Harvard Research in International Law, 29 Am. J. Int'l L. Supp. 843, 857 (1935). It creates "a different relationship between" the parties and varies "the obligation of the party proposing it. . . ." 2 Hyde, International Law, Chiefly as Interpreted and Applied by the United States (2d revised ed. 1945) 1435; International Law Commission, 2d Sess., Report on the Law of Treaties by J. N. Brierly, U. N. Doc. A/CN. 4/23, 14 April 1950, pp. 41, 42-43. The purported reservation in the 1950 treaty makes no change in the relationship between the United States and Canada under the treaty and has nothing at all to do with the rights or obligations of either party. To the extent here relevant, the treaty was wholly executed on its effective date. Each party became entitled to divert its half of the agreed quantum of water. Neither party had any interest in how the share of the other would be exploited, nor any obligation to the other as to how it would exploit its own share. The Senate could, of course, have attached to its consent a reservation to the effect that the rights and obligations of the signatory parties should not arise until the passage of an

act of Congress. Such a reservation, if accepted by Canada, would have made the treaty executory. But the Senate did not seek to make the treaty executory. By the terms of its consent, the rights and obligations of both countries arose at once on the effective date of the treaty. All that the Senate sought to make executory was the purely municipal matter of how the American share of the water was to be exploited.

A party to a treaty may presumably attach to it a matter of purely municipal application, neither affecting nor intended to affect the other party. But such matter does not become part of the treaty. The Republic of New Granada, in 1857, attached such purely municipal matter to its ratification of a treaty with the United States. The President of the United States treated the added articles as being no part of the treaty. He ratified the treaty without resubmitting it to the Senate, stating in the protocol of exchange ratifications:

"... considering the said articles as in no way affecting the provisions of the said treaty, but as being acts simply of domestic legislation on the part of the Granadian Confederacy, and as implying no reciprocal obligation on the part of the United States, the said exchange has this day been effected in due form. [Miller Reservations to Treaties (1919) 27.]

The constitutionality of the reservation as a treaty provision was extensively argued by the parties. The respondent merely suggests that that "there is no apparent limit" to what may be done under the treaty power, citing *Missouri v. Holland*, 252 U.S. 416 (1920). Intervenor Rochester Gas and Electric Corporation puts the proposition more baldly. It defends this reservation as an "exercise of the treaty-making power to legislate in the domestic field . . ." calling our attention to the fact that the Supreme Court has never held a treaty provision unconstitutional. But it has been pointed out that the Court has never had occasion to consider a treaty provision which "lacked an obvious connection with a matter of international concern." 2 Hyde International Law, Chiefly as Interpreted and Applied by the United States (2d revised ed. 1945) 1401. The instant reservation is *sui generis*. There is complete agreement by all concerned that it relates to a matter of purely domestic concern.

In *Missouri v. Holland*, 252 U. S. at 433, Mr. Justice Holmes questioned, but did not decide, whether there was any constitutional limitation on the treaty-making power other than the formal requirements prescribed for the making of treaties. The treaty he sustained related to a "national interest of very nearly the first magnitude" which "can be protected only by national action in concert with that of another power." *Id.* at 435. And it conferred rights and imposed obligations upon both signatories. *Id.* at 431. The treaty power's relative freedom from constitutional restraint, so far as it attached to "any matter which is properly the subject of negotiation with a foreign country," *Ware v. Hylton*, 3 Dall. 199 (1796), is a long-established fact. *Geofroy v. Riggs*, 133 U. S. 258 (1890). No court has ever said, however, that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations.

Our present Secretary of State has said that the treaty power may be exercised with respect to a matter which "reasonably and directly affects other nations in such a way that it is properly a subject for treaties which become contracts between nations as to how they should

act"; and not with respect to matters "which do not essentially affect the actions of nations in relations to international affairs, but are purely internal." He had earlier said:

"... I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern."

Charles Evans Hughes, just before he became Chief Justice and after he had been Secretary of State, addressing himself to the question whether there is any constitutional limitation of the treaty power, said:

"... The Supreme Court has expressed a doubt whether there could be any such. ... But if there is a limitation to be implied, I should say it might be found in the *nature* of the treaty-making power.

"... The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that have no relation to international concerns.

... the nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution, and I am not aware of any which would in any way detract from the power as I have defined it in connection with our relations with other governments. But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdiction of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power."

In the Dulles view this reservation, if part of the treaty, would be an invalid exercise of the treaty power. In the Hughes view, its constitutionality would be a matter of grave doubt. "The path of constitutional concern in this situation is clear." *United States v. Witkovich*, 853 U. S. 194 (1957). We construe the reservation as an expression of the Senate's desires and not a part of the treaty. We do not decide the constitutional question.

It is argued that, since the reservation was a condition to the Senate's consent to the treaty, to deny effect to the condition vitiates the consent and thus invalidates the whole treaty. That argument, we think, was disposed of by the Supreme Court in *New York Indians v. United States*, 170 U. S. 1 (1898). That case, in its resolution of consent to the treaty, had attached certain amendments and declared that "the treaty shall have no force or effect whatever . . . nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto. . . ." *Id.* at 21-22. The amendments which the Senate attached to its resolution consenting to the treaty, as the Supreme Court recognized,

were not communicated to the Indian tribes. The Court concluded that the amendments were not part of the treaty. It nevertheless treated the Senate's consent as effective to make the treaty valid and operative. *Id.* at 22-24.

The order under review is set aside and the case remanded to the Federal Power Commission.

It is so ordered.

Seizure of private oil stocks in violation of Hague Regulations by belligerent occupant—captured oil stocks as war booty—status under municipal law—expert testimony—proof of foreign law

N. V. DE BATAAFSCHE PETROLEUM MAATSCHAPPI & ORS. *v.* THE WAR DAMAGE COMMISSION. 22 Malayan Law Journal 155 (1956).

Court of Appeal, Singapore, April 13, 1956. Whyatt, C.J., Mathew, C.J., and Whitton, J.¹

Oil stocks in the Netherlands East Indies, which were owned by Dutch corporations, were seized by Japanese armed forces and used for Japanese civilian and military purposes. They were not, however, requisitioned by the Japanese under the Hague Regulations. Large quantities of these stocks were found in Singapore at the end of the war, and were seized by the British Army as war booty. The Dutch corporations claimed compensation. Their claim was dismissed below, but on appeal was allowed. Whyatt, C.J., in an opinion² stating the facts more fully, said in part:

This is an appeal from a decision of the Board constituted under the Singapore Essential Regulations dismissing a claim by the appellants in respect of large quantities of petroleum which were seized as war booty by the armed forces of the Crown on the re-occupation of Singapore on the 5th September, 1945. The appellants contend that the petroleum was their property and not, as the respondents allege, the property of the Japanese State and in support of their contention, they rely upon two broad submissions, first, that they had a valid title to the petroleum under municipal law, and secondly, that they were never lawfully deprived of their title by the Japanese belligerent occupant.

Before examining these submissions in detail, it will be convenient to set out the relevant facts which have been proved or admitted in the course of these lengthy proceedings. The appellants are three oil companies, incorporated in Holland, who prior to the outbreak of the war with Japan in 1941, carried on the business of producers and refiners of oil in Sumatra. Between them, they held all the concessions in Sumatra and owned two large refineries in the Palembang area in the southern part of the island. The total number of concessions was 86 of which 61 were held by the first appellant, 2 by the second appellant and 23 by the third appellant. The earliest concession was granted by the Netherlands Indies Government in 1907, and thereafter concessions were granted at various dates for periods ranging from 40 years to 75 years, the last concession being granted in 1941. By the end of 1941, the appellants had established production in 32 oil reservoirs, as they are technically known, situated

¹ Opinion furnished by courtesy of G. W. Haight, Esq., of the New York Bar.

² Citations inserted and punctuation occasionally supplied.

in various places in the concession areas as shown on a map produced at the hearing of the appeal. These oil reservoirs are geological structures enclosing the crude oil in its natural state and it was agreed by the parties that the oil does not escape from them except by means of boreholes, or wells, drilled into the reservoirs from the surface. No detailed information was supplied as to the number of wells which had been drilled into the reservoirs by the appellants by the end of 1941 or as to the rate of production of the wells at that date but it may be inferred that production was on a substantial scale from the fact that the two refineries already referred to had a total capacity of 90,000 gallons per day. The position, therefore, at the outbreak of hostilities, was that the appellants were producing crude oil in commercial quantities from some 32 reservoirs under concessions granted by the Netherlands Indies Government which still had substantial periods to run, and were refining crude oil obtained from these reservoirs on a large scale in their refineries at Palembang.

For the evidence of the events which occurred during the Japanese occupation, the parties were, of necessity, dependent upon the testimony of Japanese naval and military officers. The effect of this testimony, some of which was given orally, and some on affidavit, may be summarised as follows: When the Japanese armed forces occupied Sumatra, they immediately seized the appellants' installations in the field and also their refineries at Palembang because, as a Japanese naval officer, Admiral Watanabe, called by the respondents, put it, "oil was the most vital war material at that time, and personally, I thought we started the war for the sake of the oil." The installations had been badly damaged as part of the Netherlands Indies Government's denial policy, and the Japanese military authorities organized a special technical unit under military discipline to repair them. By the end of the first year of the Japanese occupation, they were all in working order again and crude oil was once more being extracted from the reservoirs and being processed in the appellants' refineries. The Japanese military authorities did not bring any new oilfields into production but continued to extract oil from the existing reservoirs throughout the period of the occupation. The oil so extracted, or at least a substantial part of it, was shipped as refined products, and sometimes as crude, to Singapore where it was kept in storage tanks, belonging in some cases to the appellants' associated companies, until eventually it was forwarded to various destinations in Malaya, Thailand, French Indo-China and Japan proper to meet not only military demands but also civilian requirements in those areas. The Japanese colonel in charge of the Shipping Department of the Petroleum Office in Singapore throughout the occupation estimated that 6,000,000 kilo-litres, or approximately, 1,200,000,000 gallons, of petroleum from the Sumatra oilfields were distributed during the war in this way from the Singapore "relay storage point," as he called it, to military and civilian consumers in the southern theatre of war: he gave no estimate of the respective quantities allocated to military and civilian consumers. When the British landed in Singapore on the 5th September 1945, they found in the storage tanks approximately 55,000,000 gallons of refined petroleum and 11,000,000 gallons of crude oil, all of which, as is admitted by the respondents, had been extracted from the oil reservoirs in Sumatra by the armed forces of the belligerent occupant, and after refining at Palembang in the case of the refined products, had subsequently been shipped by them to the storage relay point in Singapore. The British military forces

seized the petroleum stocks as war booty. Later, by an arrangement which the parties agree does not affect the issues in this case, the appellants were allowed to withdraw 20,000,000 gallons of refined and crude oil, leaving a balance of 46,000,000 gallons of refined products, which has been valued, by agreement between the parties, on the basis of 1941 Gulf prices at \$5,099,490, which is the amount claimed by the appellants in these proceedings.

It is against this background of facts that I now turn to consider the numerous issues of law which have been raised in this case. As I have already indicated, they fall broadly under two heads, municipal law and international law; but it would be wrong to suppose that this division represents a true dichotomy, and indeed the complexity and multiplicity of the arguments in this case may well be due, in part at least, to a tendency to treat the issues as belonging rigidly to one or other of these branches of the law. The substantial contest in this case is between the appellants and the respondents' predecessors in title, the Japanese belligerent occupant, who is an International Person, and therefore it follows that when their competing claims are considered under municipal law, there is inevitably introduced an element of international law in view of the international status of one of the claimants. . . .

At the outset of their argument, the appellants recognized that it was incumbent upon them to show a good root of title under municipal law to the oil in the reservoirs in Sumatra prior to the Japanese invasion. It might be thought that an issue of this kind would not raise controversial questions of law but in the present instance this proved not to be the case for the respondents strenuously maintained that under the municipal law of the Netherlands Indies the oil in the reservoirs, far from belonging to the appellants, was a *res nullius* until it was seized *vi et armis* by the Japanese belligerent occupant. It, therefore, becomes necessary to examine in some detail the municipal law relating to the title to oil in Sumatra when it is existing in its natural state in reservoirs under the ground. The municipal law to be applied is, of course, the domestic law of the Netherlands Indies but since Netherlands Indies law is presumed to be the same as English law unless differences between the two are alleged and satisfactorily established, it will be useful, in the first place, to consider whether under the law of England oil *in situ* is a *res nullius*. It should perhaps be mentioned at this point that the *lex fori* in this case is the law of Singapore but as neither party has relied upon any distinction between the law of Singapore and the law of England in these proceedings, I propose to proceed upon the assumption that there are no material differences between the two systems affecting the present appeal. . . .

The question of the precise nature of the legal interest created in the appellants by these concessions is, however, of less importance than it might otherwise be in view of the conclusion which I have reached as to when the appellants reduced the oil in the reservoirs into their possession. Possession in this sense is, of course, a question of fact, and, as Dr. Veegens remarked in his evidence, sometimes a difficult question of fact. But being a question of fact and not of law, it was not altogether appropriate that an expert in law should be asked to give his opinion on it. Nevertheless Dr. Veegens was questioned about this matter and gave it as his view that the oil was reduced into possession as soon as, but not before, it got into the "vertical pipe." In giving this opinion, Dr. Veegens was handicapped, as indeed the Board was also, by the circumstance that there was very little evidence

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at the hearing before the Board as to the position in regard to the operations of the appellants in the oilfields at the relevant dates. During the course of the hearing of the appeal, however, the evidence on this aspect of the case was supplemented by further facts which were agreed between the parties, and as a result, a somewhat clearer picture of the appellants' operations in the field is now available to the Court. As I have already said, the oil in question was trapped in a number of underground reservoirs from which it could not escape by natural means. The appellants had tapped these reservoirs by drilling a number of bore-holes or wells into them and by means of these wells, they were, at the outbreak of hostilities, extracting oil from them in substantial quantities in accordance with ordinary commercial practice. The question is whether in this state of facts the appellants can be said to have had possession of the oil in the reservoirs and this must in turn depend upon such further questions as the kind of physical control of which oil in a reservoir is practically capable, whether the appellants had physical control over the whole of the reservoirs, and whether they had sufficient control for practical purposes to prevent strangers interfering with the oil whilst it was still in the reservoirs. Unlike solid minerals, where control is acquired by sinking shafts and driving underground workings into the mineral deposits, control of oil in an underground reservoir is acquired by drilling wells—inserting "vertical pipes," as Dr. Veegens called them—into the reservoir from the surface. It was not suggested physical control could be exercised in any other way over the oil in an underground reservoir. The question whether the control is effective over the whole of the reservoir must depend, it seems to me, upon whether the number of wells is sufficient to enable the oil to be extracted from every part of the reservoir. In the present case, it appears to be reasonable to infer from the fact that the appellants were extracting oil from these reservoirs in substantial quantities in accordance with ordinary commercial practice, that they had drilled a sufficient number of wells to enable them to exercise effective control over all parts of the reservoirs. It is clear also from the evidence in this case that the appellants had sufficient control to exclude strangers from interfering with the reservoirs, subject to a few possible exceptions to which I will refer presently. In my opinion, therefore, the oil in the reservoirs was under the control of the appellants to the extent that it was capable of being under control and they were in fact dealing with it as fully and completely as any owner could deal with oil trapped in an underground reservoir. Accordingly I reach the conclusion that the appellants were in actual possession of the oil in the reservoirs at the time of the Japanese invasion. With regard to the possible exceptions, it was pointed out by counsel for the respondents that there were three or four reservoirs which, according to the map, appeared to be on or near the boundaries of the appellants' concessions and, therefore it was possible that they might extend beyond the appellants' concessions areas under the adjoining land, in which event another concessionaire might, at some future date, drill wells into these reservoirs which are at present being exploited solely by the appellants. If this were to happen, some of the oil at present in the appellants' portion of the reservoirs might flow into portions of the reservoirs underneath the new concession areas, replacing oil which the new concessionaire had extracted through his wells, as occurred, or at least as was envisaged, in the case of *Borys v. Canadian Pacific Railway*, (1953) A.C. 217, (at page 220). However, until this actually happens, it seems to me that the correct view

is that the appellants have possession of the oil in these reservoirs subject to the possibility that they may be divested of possession of some of it if a new concession is granted enabling the reservoirs to be tapped from the surface of the adjoining land. As this has not yet occurred, it does not affect my finding that at the outbreak of hostilities, the appellants had acquired possession of the oil in these reservoirs by drilling wells into them and extracting the contents on a commercial scale. In view of this finding, it matters not whether the interest created in the appellants by the concessions is to be regarded as analogous to a lease or to a profit à prendre; they had actual possession of the oil in the reservoirs and this, combined with the sole right to dispose of it, gave the appellants as complete a title to the oil as it was possible for any one to have during the period of the concession.

I now turn to consider whether the appellants were at any time lawfully deprived of their title by the Japanese belligerent occupant in accordance with international law but before doing so, it will be convenient to mention briefly two subsidiary arguments on the *res nullius* aspect of the case, in view of the possibility that this case may be considered by another Court. The respondents contended that under Netherlands Indies law a trespasser who wrongfully reduces a *res nullius* into possession, as, for example, a poacher who wrongfully kills game on another's land, becomes the owner of the *res*. In this, Netherlands Indies law differs from English law which, as is clearly laid down in *Blades v. Higgs*, 11 H.L.C. 621, provides that a *res nullius* reduced into possession by a trespasser becomes the property, not of the trespasser, but of the owner of the land. The respondents argued, therefore, that, on the assumption that the Japanese armed forces in extracting oil from the reservoirs were to be regarded as trespassers reducing a *res nullius* into possession, they would, under Netherlands Indies law, become the owners of the extracted oil. The short answer to this argument, in my view, is that an individual who commits a trespass when reducing a *res nullius* into possession is in a very different category from a belligerent occupant who does so. The former is subject to the restraints of the police and of municipal courts, whereas the latter is subject to no control at all and could, therefore, commit trespass continuously throughout the period of his occupation. The respondents maintained that this distinction was immaterial, but, in my view, it is very relevant in considering whether the municipal law of the Netherlands Indies relating to trespassers who reduce a *res nullius* into possession should be interpreted as being so benevolent as to include a belligerent occupant. I should require very cogent evidence to persuade me that "trespasser" in this context includes a belligerent occupant and as this was not forthcoming, I reject this alternative argument of the respondents.

The second subsidiary argument was an argument advanced by the appellants and was based on a Netherlands Indies Ordinance known as the Wartime Legal Relations Ordinance enacted in 1940. This Ordinance, which was said to resemble in some respects the English Trading with the Enemy legislation, provided that if any act was performed without the previous permission of a Committee acting under the Netherlands Indies' Director of Economic Affairs, which might directly or indirectly benefit the enemy, it would be void *ipso jure*. Therefore, according to this contention, the act of the belligerent occupant in reducing the *res nullius* into possession when he extracted the oil from the reservoirs (assuming it to be a *res nullius*, for the purpose of this argument) without first obtaining the

permission of the Director of Economic Affairs' Committee, was void, *ipso jure*, and consequently no title was acquired by the belligerent occupant to the extracted oil. This argument illustrates the difficulty which arises if, as seemed to me to occur too frequently in the course of this case, international law is regarded as an entirely separate matter instead of being treated as an integral part of the law governing the issues in this appeal. The provisions of the Wartime Legal Relations Ordinance were, no doubt, very appropriate when applied to "persons," as defined in section 1 of the Ordinance, but to contend that they apply to a belligerent occupant, that is to say, to an International Person, who is thereby placed under a statutory obligation to seek the permission of the Director of Economic Affairs before doing any act which might benefit the enemy (which is, of course, himself) is, to my mind, an untenable proposition.

I now proceed to consider whether the Japanese belligerent occupant had a right, under international law, to seize the crude oil in the ground and so deprive the appellants of their title to it. It was common ground that if such a right did exist in the belligerent occupant, it was derived from Article 53 of the Hague Regulations. Before, however, I examine this Article, it is necessary to consider a formidable submission advanced by the appellants which, if sound, renders a detailed examination of the Hague Regulations academic. The appellants contended that Japan commenced the war, or at least launched an invasion against the Netherlands Indies, in order to secure the oil supplies of that country, because oil is an indispensable raw material in conditions of modern warfare. Therefore the Japanese invading armies, as soon as they had established the necessary military superiority, seized the appellants' installations, "lock, stock and barrel," and then proceeded, as speedily as possible, to repair and put them into operation, using for that purpose civilian technicians, called "Gunzokus," who were attached to the army and placed under service discipline. The whole operation, according to the appellants' argument, was prepared and executed by the Japanese military forces in accordance with Japan's Master Plan to exploit the oil resources of the Netherlands Indies in furtherance of their war of aggression. The plan was successful and enabled the Japanese forces in South East Asia in the course of the war to distribute vast quantities of oil, both crude and refined, to meet the needs of military and civilian consumers in the territories under their control and in Japan proper. This exploitation of the oil resources of the Netherlands Indies was, so the appellants contend, premeditated plunder of private property by the Japanese State on a totalitarian scale and, as such, it was contrary to the laws and customs of war.

The appellants rely upon the evidence of Japanese naval and military officers to prove the facts upon which this submission is based. The Chief of the Fuel Section of the Supply Depot of the Ministry of the Navy in Tokyo stated that he was concerned in the spring of 1942 with plans for restoring the oil fields of the Netherlands Indies and later he toured the captured oil fields and arranged for personnel and material to be sent to repair them and put them into working order again. From October 1943 onwards he was stationed in Singapore which was then being used as a storage and forwarding point for naval and military fuel; some of it was crude oil which was forwarded to Japan to be refined, some of it was aviation spirit and diesel oil and was used by the army and navy in Singapore. Further details concerning the processing, refining and distribution of the oil

were given by the Japanese military officers who were stationed at Palembang and at the Headquarters of the Petroleum Office in Singapore which clearly show that in addition to supplying military requirements, the oil was also used to meet civilian demands. In my view this evidence establishes that the seizure of the appellants' oil installations in Sumatra by the invading army was carried out as part of a larger plan prepared by the Japanese State to secure the oil resources of the Netherlands Indies, not merely for the purpose of meeting the requirements of an army of occupation but for the purpose of supplying the naval, military and civilian needs of Japan, both at home and abroad, during the course of the war against the Allied Powers.

These facts being proved, the next question to be determined is whether seizure of private property on such a scale and for such purposes was contrary to the laws and customs of war. On this point there is, fortunately, considerable authority available from decisions arising out of the war in Europe. First, there is the decision of the Nuremberg Tribunal, delivered in 1946, in which the principle is laid down that to exploit the resources of occupied territories in pursuance of a deliberate design to further the general war of the belligerent without consideration of the local economy, is plunder and therefore a violation of the laws and customs of war. This principle has been approved and further expounded in the cases of *In re Flick*, (1947) U.S. Military Tribunal, Nuremberg, and *In re Krupp*, (1948) U.S. Military Tribunal, Nuremberg, and *In re Krauch*, (1948) U.S. Military Tribunal, Nuremberg, where it was applied to the acts of German industrialists who systematically plundered the economy of occupied territories by acquiring substantial or controlling interests in private property contrary to the wishes of the owners. The present case is much stronger as the plunder of the appellants' property was committed not by Japanese industrialists but by the Japanese armed forces themselves, systematically and ruthlessly, throughout the whole period of the occupation. In my opinion, these authorities fully support the appellants' submission. Accordingly I reach the conclusion that the seizure and subsequent exploitation by the Japanese armed forces of the oil resources of the appellants in Sumatra was in violation of the laws and customs of war and consequently did not operate to transfer the appellants' title to the belligerent occupant.

I now turn to the alternative argument urged by the appellants under this head, namely, that in any event the seizure was illegal as the crude oil in the ground was not "*munitions-de-guerre*" within the meaning of Article 53 of the Hague Regulations because it was then a raw material and, moreover, an immoveable raw material. According to the British Manual of Military Law issued by the Army Council pursuant to the provisions of Article I of the Hague Regulations, "*munitions-de-guerre*" are such "things as are susceptible of direct military use." The respondents accept this interpretation of "*munitions-de-guerre*," as indeed they are bound to do since they are, in fact, the Crown although not appearing as the Crown *eo nomine* in these proceedings. Consequently they are compelled to argue that crude oil in the ground, although a raw material, is susceptible of direct military use or at least had a sufficiently close connection with direct military use to bring it within Article 53. No direct authority was cited for the proposition that raw materials could be "*munitions-de-guerre*" but the respondents referred to a passage in *Oppenheim's International Law* (7th Edition) at page 404 where it is

said that "all kinds of private moveable property which can serve as war material, such as . . . cloth for uniforms, leather for boots . . . may be seized . . . for military purposes . . ." which they contend supports the view that raw materials can be "*munitions-de-guerre*." On the other hand, *Professor Castren*, a Finnish Professor, in "*Law of War and Neutrality*," at page 236, says that "Raw materials and semi-manufactured products necessary for war can hardly be regarded as munition of war." It may be that certain types of raw material or semi-manufactured products, such as cloth for uniforms and leather for boots, which could possibly be made up into finished articles by army personnel without the assistance of civilian technicians and outside plant can, without stretching the meaning of "*munitions-de-guerre*" unduly, be regarded as having a sufficiently close connection with direct military use to bring them within Article 53. It is not, however, necessary to decide this point as the facts of this case show that there is no such close connection in the present instance. According to the evidence, elaborate installations and civilian technicians were needed by the army to enable them to appropriate this oil and prepare it for use in their war machines. It had to be extracted from underground reservoirs, and then transported to a refinery, and then subjected to a complicated refining process before it was of any use to any one. In these circumstances, it cannot be said, in my opinion, that at the moment of its seizure in the ground, the oil had a sufficiently close connection with direct military use to bring it within the meaning of "*munitions-de-guerre*" in Article 53.

A further argument advanced by the appellants was that "*munitions-de-guerre*" does not include an immoveable and as the crude oil, when seized, was part of the realty, it was not a "*munitions-de-guerre*." The appellants conceded that certain things included in the categories specified in Article 53 which partake of the character of the realty, as for example, a railway transportation system, are seizable but they contended that these are exceptional cases and ordinarily Article 53 does not apply to immoveables. It was contended that oil in the ground could not be regarded as an exceptional case and in support of this view, reliance was placed on a *dictum* of Lord Simon in *Schiffahrt-Treuhand v. Procurator General*, (1953) A.C. 232, (at page 262) to the effect that "it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting). . . ." Lord Simon was not, of course, intending to give an exhaustive interpretation of "*munitions-de-guerre*" but, it would, I think, be a startling extension of his phrase "arms or ammunition which could be used against the enemy in fighting" to say that it could include minerals *in situ*. In my judgment, Article 53 was intended to apply, generally speaking, to moveables and only in those categories where the description is wide enough to include things which may belong, in part, to the realty, as, for example, "appliances for the transport of persons or things" mentioned at the beginning of the second paragraph of the Article, is it permissible to interpret it so as to include immoveables. "*Munitions-de-guerre*" is not, in my view, such a category. Accordingly I hold that crude oil in the ground, being an immoveable and not susceptible of direct military use, is not a "*munitions-de-guerre*" within the meaning of Article 53.

The appellants, who were nothing if not prolific in preferring alternative arguments, contended that even if crude oil in the ground

could be seized as "*munitions-de-guerre*" under Article 53, the seizure in this case was invalid because no receipt was given to the owners or any one representing them. Article 53 does not in terms require a receipt whereas Article 52 (which deals with requisitioning) expressly provides for one; consequently it might be said, as a matter of pure construction, that the omission in Article 53 was deliberate on the part of those who framed the Regulations and such a requirement ought not to be implied. This, however, is not the view taken by municipal courts which have construed this Article. In the case of *Billotte*, (1948) Netherlands District Court, Arnhem . . . it was held that the failure of German military personnel to give a receipt when seizing a car rendered the seizure invalid. The Court of Cassation at the Hague took a similar view in *Hinrichsen's* case in 1950. In that case a German Customs Frontier Guard seized two motor cycles without giving a receipt to the owner and the Court held that "this may not be done without in some way being officially acknowledged, in order to ensure compliance with the rule that such goods must be returned and compensation fixed when peace is made." In reaching their decision the Court of Cassation referred to the report of the proceedings at the First Hague Peace Conference (1899) in which it was stated that although it had not seemed opportune to make a special stipulation with regard to a receipt, the Committee nevertheless were of the opinion that the fact of seizure should be clearly stated one way or another if only to furnish the owner with an opportunity to claim an indemnity. Furthermore, as the Court of Cassation pointed out, the British Manual of Military Law contains a statement to the same effect. The respondents sought to distinguish these authorities from the present case on the ground that a receipt or acknowledgement was not required when the seizure was otherwise notorious. No authority was cited in support of this view, but in any case it does not meet the case where, as here, the fact of seizure is notorious but the quantity seized is unknown. The appellants do not know and have no means of discovering how much crude oil was seized from their oil reservoirs during the Japanese occupation and even if everything else had been done according to law, it would not now be possible for them to claim the compensation expressly provided for in Article 53. It would have been quite a simple matter for the Japanese belligerent occupant to have given an official acknowledgment to the Custodian of Enemy Property who, so the Court was told, was appointed by the Japanese in Sumatra to represent absent owners, and to have furnished him with proper records of the crude oil they extracted; but nothing of the kind was done and the failure to do so, was, in my opinion, an infringement of Article 53 and renders the seizure invalid.

The last alternative argument advanced by the appellants on the construction of Article 53 was that even where the seizure is valid in all respects, the belligerent occupant obtains only a provisional title to the seized property and must restore it to the original private owner if it is still *in esse* at the cessation of hostilities. They contended that in the present instance the seized property was still *in esse* when hostilities ended and therefore the rights of the appellants revived and the property should have been restored to them. In support of this proposition, the appellants relied, first, upon the express words of the Article which states that "seized articles must be restored . . . when peace is made," secondly, upon the views of *Westlake* (War, Vol. II, page 115) and *Rolin* (Le Droit Moderne de la guerre, paragraph 492), and lastly on two cases decided in municipal

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courts in 1943 and 1947 (*Pigeat et Hazard v. Cie de Traction sur Les Voies Navigables*, (1943) Dijon Court of Appeal; *Austrian Treasury v. Auer*, (1947) Supreme Court, Austria). The respondents conceded that the provisions about restoration apply to some seizures and that if, for example, the seized article had been a motor lorry, the belligerent occupant would have been bound to restore it to the owner; but they contended that it would be contrary to common sense to apply these provisions to consumable war materials, such as petroleum, which are not readily identifiable as belonging to any particular owner. Such a distinction does not appear to be based on any principle but rather on the supposed difficulty of carrying out the provisions of the Article in practice. But if, in fact, there is no practical difficulty in identifying the owner of the property, as was the position in this case, I can see no justification for departing from the plain words of Article 53. The respondents further objected that if there was a duty to restore these petroleum stocks, it did not arise until peace was actually made. It is obvious, however, that the right of the belligerent occupant to use "*munitions-de-guerre*" must cease with the cessation of hostilities, and it appears to me that when this occurs, the only right then remaining in the belligerent occupant is a right to retain possession of the property on behalf of the owner, all other rights in the property reverting in the original owner. Accordingly I am of the opinion that, on any view of the matter, the appellants were entitled to require the belligerent occupant to hold these surplus petroleum stocks on their behalf until such time as they could be restored in accordance with the provisions of Article 53.

I have now dealt with the many contentions put forward by the appellants in respect of the Hague Regulations. At the outset of his argument, counsel for the appellants claimed that in seizing this crude oil, the Japanese military forces had contravened the rules of international law in every single particular. It was a sweeping claim but I am bound to say that I think he has made it good [that] the seizure of the oil resources of the Netherlands Indies was economic plunder, the crude oil in the ground was not a "*munitions-de-guerre*," the failure to give a receipt was a fatal omission and the duty to restore the unconsumed petroleum was not fulfilled. In all these matters, the belligerent occupant, in my judgment, contravened the laws and customs of war and consequently failed either to acquire a valid title for himself or to deprive the appellants of the title which I have found existed in them prior to the seizure.

Before I leave the subject of the Hague Regulations I will refer briefly to the appellants' contention that in a war of aggression, such as this was, the aggressor state cannot in any circumstances acquire any legal title under the Regulations. This question was not very fully argued as counsel for the appellants asked that the appeal should be decided on narrower grounds although he naturally asked for the point to be kept open. Certainly this contention raises grave issues, reaching and extending far beyond the present case, touching indeed the springs of international law. The compelling logic of those who assert that all legal rights should be refused to an aggressor is opposed by persuasive reasoning of those who maintain that such rules of war as are accepted by States should continue to prevail, notwithstanding the illegality of the war. Learned jurists differ profoundly on this matter and municipal courts have yet to give a decisive answer. In this state of uncertainty of the law, it is not, I

think, desirable to express views on a matter which is not necessary for the decision in this case, and accordingly I do not pass upon it.

Before dealing with the last major issue in this case, namely, the issue of *specificatio*, I would mention an argument which was strongly relied upon by the appellants at one stage of the proceedings but later receded somewhat in importance. In 1943, a number of the Allied Governments, including the United Kingdom and the Netherlands Governments, made a formal Declaration that they reserved the right to declare invalid any dealings with property in occupied territories, and, in a covering statement, stated they were mutually pledged to examine and, if necessary, implement the invalidation of such dealings when they extended across national frontiers. The appellants contended that this Declaration was, in effect, a treaty and although it did not affect the rights of individuals in the absence of legislation, it did, nevertheless, mitigate the Crown's belligerent rights by excluding from the category of enemy public property liable to seizure as war booty, any property which had been plundered from private owners by the Japanese armed forces in the first instance. The respondents challenged this argument at every step, contending that the Declaration did not amount to a treaty, and that in any case it did not detract from the rights of armed forces of the Crown to seize war booty. They added that even if the Crown's seizure was invalid for the reasons urged by the appellants, this could not confer any title on the appellants, and therefore the contention based on the Inter-Allied Declaration was irrelevant to any issue which the Court had to determine in this case. The logic of this reasoning appears to me convincing and accordingly I reject the appellants' argument on this point.

Finally I turn to the issue of *specificatio* upon which the respondents succeeded before the Board and which assumed great prominence in the arguments presented by the respondents to this Court. Stated in its simplest terms, the issue of *specificatio* is no more than this: if the Japanese armed forces did not deprive the appellants of their title when they seized the crude oil and shipped it to Singapore, does it make any difference that in some instances (of which the present is one), they refined it before shipment? The respondents strenuously maintained that it made a fundamental difference because, according to their contention, the action of the belligerent occupant in refining crude oil extinguished the appellants' title and vested the ownership of the refined product in the belligerent occupant; or, to put the matter another way, the belligerent occupant, by refining the crude oil, purged himself of his offences against the Hague Regulations and by virtue of this process created a new title in himself which was untainted by the original illegality and, therefore, valid against the appellants. They relied in support of this proposition, not upon the laws of war but upon an ancient doctrine of municipal law, derived from Roman Law, and known in the Netherlands Indies as "*specificatio*." This doctrine was embodied in the Netherlands Indies Civil Code in 1830 and is contained in Article 606 which reads as follows:—"He who makes of a material not belonging to him a thing of a new sort becomes the owner of such thing provided he pays the price of the material. . . ." The belligerent occupant, so the argument runs, made a thing of a new sort when he refined the crude oil, and therefore became the owner.

Before examining the evidence on this matter given by the experts on Netherlands Indies law, it will be convenient to consider the Eng-

lish law applicable to this subject, since, if the Netherlands Indies law is not satisfactorily proved, it will be necessary, as in the case of the law relating to *res nullius* referred to earlier in [t]his judgment, to fall back on the presumption that it is the same as English law. The relevant principle of English law is expressed with simplicity and clarity in *In re Oatway*, (1903) 2 Ch. 356, (at page 359) where Joyce J. states: "It is a principle settled as far back as the time of the Year Books that, whatever alteration of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material: *Blackstone*, Vol. ii, page 405, and *Lupton v. White*, (1808) 15 Ves. 432." The same principle is approved in *Salmond on Torts*, 11th Edition at page 355: "If my corn is wrongfully taken from me and made into flour, the flour is mine, and if my tree is cut down and sawn into timber, the timber is mine." It seems clear, therefore, that under English law, ownership in crude oil would not be extinguished by the process of refining, whether it is done by a private person or by a belligerent occupant.

It is against this background of English law that I now turn to consider the Netherlands Indies law on this matter. The experts on both sides were in substantial agreement that under Article 606 of the Civil Code, a private individual who refined crude oil belonging to someone else would become the owner of the refined product, but when they came to consider whether the same would hold good if a belligerent occupant refined crude oil which he had unlawfully seized in violation of the Hague Regulations, they were in strong disagreement. The respondents contended that a belligerent occupant could acquire title to private property under municipal law in the same way as any private individual and referred to the practice of military commanders in occupied territory obtaining supplies by purchase under the ordinary law. The respondents also cited the case of *The French State v. Lemarchand's*, (1948) Rouen Court of Appeal, where, it was contended, the Court had, by implication, approved a belligerent occupant acquiring property under the local law by means of *accessio*, which, it was said, was similar in principle to a belligerent occupant acquiring title by *specificatio* under the local law. I very much doubt whether *Lemarchand's* case, will bear the interpretation which the respondents seek to place upon it but in any event, it is not necessary in my view to consider exhaustively all the ways by which a belligerent occupant might acquire title to private property under municipal law independently of the Hague Regulations, as the only point for decision in this case is whether the method of *specificatio* was available to the Japanese armed forces after they had seized the crude oil belonging to the appellants contrary to the provisions of the Hague Regulations. The answer to this question turns upon the construction of Article 606 of the Civil Code read together with the Hague Regulations, in particular, Articles 46 and 53 of those Regulations, which form part of the statute law of the Netherlands Indies, having been enacted as a statute in 1910. Oddly enough, the appellants' experts, Dr. Nysingh and Dr. Funke, were not specifically questioned on this point of construction, but the respondents' expert, Dr. Veegens, when asked about it, said that in his opinion the Japanese belligerent occupant could obtain a title by *specificatio* because a belligerent occupant has the same rights as any one else in the territory. Dr. Veegens fortified his opinion by reference to an official explanatory memorandum issued in 1947 to accompany the Rehabilitation of Rights Ordinance 1947 which states that where a Japanese body has administered

a business during the occupation for itself, any products made by the business from raw materials belonging to another, would become the property of the Japanese body by *specificatio*. It should be observed that this memorandum does not refer to the Japanese belligerent occupant as such, but to "Japanese or Japanized bodies" which ran businesses in the Netherlands Indies as going concerns during occupation, but, subject to this comment, the memorandum gives some support to Dr. Veegens' view that a belligerent occupant could acquire property by *specificatio* in the occupied territory. The appellants' experts, however, profoundly disagreed with this view and went so far as to say that the memorandum could not have been drawn up by good jurists. Moreover they were not content merely to deny the correctness of the memorandum but, so to speak, counter-attacked by alleging that the doctrine of *specificatio* could not, in any circumstances, be applied to an enterprise, or, as Dr. Funke called it, a *universitas rerum*, like the appellants' installations in Sumatra. In other words they said that if a person makes a new thing from material belonging to another by means of the "enterprise" of that other person, the finished product does not, in such a case, become his property because *specificatio* does not apply to the operations of an enterprise. Dr. Veegens disagreed with this view just as emphatically as Dr. Nysingh and Dr. Funke disagreed with his interpretation of the memorandum on the Rehabilitation of Rights Ordinance. He stated quite categorically that the doctrine of a *universitas rerum* had nothing to do with the doctrine of *specificatio*. A further argument advanced by Dr. Nysingh and Dr. Funke was that *specificatio* was "an act" prohibited by the Wartime Legal Relations Ordinance and therefore void *ipso jure*, but Dr. Veegens would have none of this, saying that only an "act-in-the-law," that is to say, an act which is a manifestation of the will directly aimed at producing a legal effect, was prohibited by this section of the Ordinance. There was, unfortunately, practically no common ground between the experts on any of these topics, many of which involved legal concepts unfamiliar to an English lawyer. In these circumstances, it seems to me appropriate to recall the words of Lord Greene in *Rouyer Guillet & Co. v. Rouyer Guillet & Co. Ltd.*, (1949) 1 All E.R. 244, when speaking of the construction of foreign statutes: "When you come to the statute law itself," he said, "although it is right that *prima facie* what must be considered is the evidence of the experts and not the text of the law, when the experts differ as to its meaning an English court is entitled and, if it is to perform its function properly, is indeed, bound, to apply its own mind, fortified by the opinion of the witnesses and giving what weight it thinks ought to be given to it, to the text itself and to examine it in order to make up its mind on the question of interpretation as between the two sets of witnesses."

Accordingly I now proceed to examine the text of Article 606 of the Civil Code and the relevant Articles of the Hague Regulations, in the light of the principle laid down by Lord Greene in that case. Article 606 begins with the pronoun "he" and therefore before a belligerent occupant can come within the scope of this Article, the word "he" must be construed so as to include not only a private person, but also an International Person, namely, a belligerent occupant. It is, to my mind, unlikely that the Netherlands Indies' legislature, when they enacted this Article of the Civil Code in 1830, intended it to apply to a belligerent occupant who, normally, is quite independent of the laws and the courts of the occupied territory. Dr.

Nysingh apparently shared this view because he stated, in his somewhat faltering English: "Article 606 is not meant, does not apply, to cases like this when it came into existence during the occupation of this country." But the other expert witnesses apparently did not address their minds specifically to this point. The further question to be considered is whether in any event the rest of Article 606 can be reconciled with the Hague Regulations, particularly Article 46, which states that private property must be respected, and Article 53 which prescribes the methods by which private property may be lawfully seized. If it cannot be reconciled, then all the experts agree that the Hague Regulations must prevail. It is clear that Article 606 postulates that the person acquiring title to property by *specificatio* is a person having no lawful title to the raw material from which the new thing is made. Therefore a belligerent occupant seeking to acquire title under Article 606, must, *ex hypothesi*, have acquired the raw material unlawfully and this, in the case of a belligerent occupant, necessarily means inconsistently with the Hague Regulations. Consequently a belligerent occupant cannot bring himself within both the Hague Regulations and the provisions of Article 606. The two are irreconcilable and since the Hague Regulations prevail, it follows a belligerent occupant cannot avail himself of Article 606. But if this construction is not correct, the matter is, in my view, at best left in doubt and therefore a presumption arises in favour of English law, which, as I have already explained, preserves the title of the true owner if he can prove the identity of the original materials. Accordingly in my judgment the plea of *specificatio* fails.

The further question whether a British court would apply the Netherlands Indies' law if it gave a title by *specificatio* to a belligerent occupant in circumstances such as occurred in this case, does not, therefore, arise, but if it were necessary to consider the point, I should be prepared to hold that it was contrary to public policy for a British court to recognize a foreign law which confers validity on illegal acts committed by a belligerent occupant in violation of the Hague Regulations.

I would only add that it would indeed be strange, if after committing a breach of the Hague Regulations, the belligerent occupant could invoke the municipal law of the hostile state, not only to avoid the consequences of his delinquency but also to give him a good title against the world. The conclusion I have reached avoids this ironical result and harmonizes with the maxim "*Ex injuria jus non oritur*" which, as Professor Lauterpacht has said, expresses a principle of particular importance in the international sphere where sanctions cannot easily be applied against wrongdoers.

For these reasons I am of the opinion that the appeal should be allowed. The appellants should have the costs of the appeal and of the proceedings before the Board. [Other opinions omitted.]

NOTES

Statute of limitations not tolled by war in suit for compensation against United States—strict construction of waiver of governmental immunity—exhaustion of administrative remedies

Philippine resident sued in Court of Claims for compensation for supplies furnished Philippine guerilla forces during Japanese occupation in World War II. The suit was filed more than six years after the last alleged req-

uisition. Claimant argued that the applicable six-year statute of limitations, 62 Stat. 976, 28 U.S.C. § 2501, was tolled by the war. It was also urged that denial of the claim by the Army Claims Service was a prerequisite to suit in the Court of Claims. Both contentions were rejected. *Soriano v. United States*, 352 U. S. 270 (U. S. Sup. Ct., Jan. 14, 1957, Clark, J.). Douglas, Black and Frankfurter, JJ., dissented on the ground the claim did not accrue until the Army Claims Service denied payment. See also *Compania Maritima v. United States*, 145 F. Supp. 935 (Ct. Cls., Nov. 7, 1956, Laramore, J.), where the same statute of limitations was held not to be suspended during the war on the ground that such an implied exception only applied between enemies.

Applicability of Labor-Management Relations Act to dispute between foreign ship and foreign crew in U. S. port

In *Benz v. Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (U. S. Sup. Ct., April 8, 1957, Clark, J.), it was held that the Labor-Management Relations Act of 1947, 29 U.S.C.A. § 141 *et seq.*, did not apply to a labor dispute between a foreign ship and a foreign crew in U. S. territorial waters in the absence of a clear Congressional assertion of intention to exercise its admitted power to make the Act applicable. Douglas, J., dissented.

Aliens—deportation—Filipino resident in the United States since 1930 is deportable "alien" under Act of February 18, 1931

In *Rabang v. Boyd*, 353 U. S. 427 (U. S. Supreme Court, May 27, 1957, Brennan, J.), the Supreme Court held that a Filipino, who was born in the Philippines in 1910, and entered the United States in 1930 and has since resided here, and who was convicted of a narcotics violation in 1951, became an "alien" within the Act of February 18, 1931, by virtue of the proclamation of Philippine independence on July 4, 1946, and the effect of Section 14 of the Philippine Independence Act of 1934,¹ and hence was deportable. Douglas, J., dissented.

Deportation for offenses not deportable at time committed—retrospective legislation

In companion cases, the Supreme Court held that aliens, who, under previous Immigration Acts, had acquired a non-deportable status, nevertheless lost that status by specific provisions of the Immigration and Nationality Act of 1952² despite the saving clause³ in that Act, and that Congress could retrospectively make conduct deportable which was not so at the time the conduct occurred. *Lehmann v. U. S. ex rel. Carlson*; *Mulcahey v. Catalanotte*, 353 U.S. 685, 692 (U. S. Sup. Ct., June 3, 1957, Whittaker, J. Black and Douglas, JJ., dissented).

¹ 48 Stat. 464

² 8 U.S.C.A. §§ 1101 *et seq.*

³ § 405 (a).

Admiralty—limitation of liability—power of court to adjudicate all claims arising out of disaster—availability of proceedings where claims less than limitation fund

The United States, as owner of the *Haiti Victory*, filed a limitation proceeding under the Limited Liability Act¹ in a U. S. District Court. The British Transport Commission, owner of the *Duke of York*, which had collided with the *Haiti Victory* in the North Sea, filed a claim and an answer denying fault. Other claimants and the United States filed cross-claims against the *Duke of York*. The District Court dismissed all of the cross-claims. The decision of the District Court was reversed by the Court of Appeals for the Fourth Circuit and the reversal was upheld by the Supreme Court. The Supreme Court held that an admiralty court had power, in a limitation proceeding involving a collision, in which parties cross-claimed against each other as well as with respect to third parties' claims, to adjudicate all demands arising out of the same disaster. *British Transport Commission v. U. S.*, 354 U. S. 129 (U. S. Supreme Court, June 10, 1957, Clark, J. Brennan, Frankfurter, and Harlan, JJ., dissented).

NOTE: In *Lake Tankers Corp. v. Henn*, 354 U. S. 147 (U. S. Supreme Court, June 10, 1957, Clark, J.), claims filed in the limitation proceeding were less in value than the statutory fund. The Supreme Court held that the principal claimant could proceed under these circumstances with a State court action (Harlan, Frankfurter, and Burton, J.J., dissented).

Conflict of laws—New York statute authorizing support for former wife after valid ex parte divorce in Nevada not violative of Full Faith and Credit

Husband and wife were divorced in Nevada in 1953 in an *ex parte* proceeding instituted by husband. The final decree released the parties "from the bonds of matrimony and all the duties and obligations thereof. . . ." Subsequently, the former wife sought separation and alimony in a New York action, in which the former husband's assets in New York were sequestered but no personal service was obtained. The husband claimed the Nevada decree, under the full faith and credit clause, ended any duty of support. The New York courts found the Nevada divorce valid as to status but upheld a support order on the basis of a New York statute providing for such orders subsequent to a valid divorce. This application of the statute was upheld by the U. S. Supreme Court as against the full faith and credit contention. The Court held that the Nevada decree as to support was void for lack of personal service on the wife. *Vanderbilt v. Vanderbilt*, 354 U. S. 416 (U. S. Supreme Court, June 24, 1957, Black, J. Harlan and Frankfurter, J.J., dissented).

¹ 46 U.S.C. §§ 183-186.

Discovery—Swiss law against production of records—dismissal of action for failure to produce records

Action to recover assets seized as alleged enemy property. Plaintiffs had been ordered to produce records of Swiss banking house. Swiss Government approved plan for neutral investigator to inspect records for relevancy and to secure production of relevant records by letters rogatory. This was held to be insufficient compliance with discovery order and the complaint was dismissed with prejudice after seven years of litigation. This dismissal for failure to comply with U. S. rules and procedures for discovery was upheld by the Court of Appeals of the District of Columbia as not fundamentally unfair or arbitrary. *Societe Internationale, etc. v. Brownell*, 243 F. 2d 254 (Ct. A., Dist. Col., April 11, 1957, rehearing denied, *In Banc*, May 10, 1957, *Per Curiam*).

Passports—requirement of non-Communist affidavit not violative of constitutional rights of applicant

The requirement of a non-Communist affidavit before receiving a passport was upheld on the ground that the interests of national security outweigh the inroads on the rights of the individual. *Briehl v. Dulles* (Ct. A. Dist. Col., June 27, 1957, *In Banc*, opinions by Prettyman, J., and Washington, J.; Edgerton, Ct. J., and Bazelon and Foley, JJ., dissented).

Jurisdiction—use of trademark in foreign country—trade name and unfair competition—Lanham Act—power to enjoin acts abroad

Action to enjoin further alleged infringement and unfair competition in plaintiff's trademark and trade name. Defendants were charged with deliberately counterfeiting plaintiff's label and trademark on various canned foods and sauces which plaintiff sold in the United States and Mexico. Defendants were a California corporation, and an American and a Mexican citizen, both resident in the district. Defendants were further charged with obtaining materials for said counterfeiting within the United States and transporting them to Mexico for packing there under purported authority of a Mexican trademark and there selling the simulated goods to the plaintiff's detriment. Plaintiff's action to cancel defendant's Mexican mark was still pending in Mexico. On plaintiff's motion for preliminary injunction pending trial and defendant's motion to dismiss for lack of jurisdiction or for failure to state a claim, a preliminary injunction was granted, and the motion to dismiss was denied. *Ramirez & Feraud Chili Co. v. Las Palmas Food Company*, 146 F. Supp. 594 (U. S. Dist. Ct. S.D. Calif. Central Div., Nov. 8, 1956, Mathes, D.J.).

Right of alien to sue—reciprocity with Latvia

Plaintiffs, citizens of the Republic of Latvia and resident in the U. S., sued to recover interest on a tax refund. • The United States moved to dis-

miss on the ground that U. S. citizens could not sue in Latvian courts within the requirements of 28 U.S.C. § 2502. Plaintiffs relied on the treaty of 1928¹ between the U. S. and the Republic of Latvia, providing for mutual access to courts. The motion to dismiss was denied without prejudice on the ground that whether reciprocity existed presented an issue of fact. *Zalcmanis v. U. S.*, 149 F. Supp. 169 (Ct. Cls., March 6, 1957, Laramore, J.).

Aviation—Warsaw Convention—limitation on damages does not contravene Constitutional right to jury trial

The limitation of damages in the Warsaw Convention² was upheld against attack on the ground it violated the guarantee of a jury trial in the Federal Constitution. The assessment of damages was said not to be an exclusive function of a jury and the change in the burden of proof was regarded as a reasonable *quid pro quo*. *Pierre v. Eastern Air Lines, Inc.*, 152 F. Supp. 486 (U. S. Dist. Ct., N.J., June 27, 1957, Meaney, D.J.).

Capacity to sue

Action by the President of the National Hungarian Government in exile to recover funds deposited in Swiss bank and delivered by it to the successor government was sustained as an individual suit by beneficiaries of the fund for breach of contract, although it was held that the President had no capacity to sue as such in view of U.S. recognition of the successor government. *Varga v. Credit Suisse*, 162 N. Y. S. 2d 80 (Sup. Ct., Spec. Term, N.Y. City, Part III, April 22, 1957, Gold, J.). An earlier phase of the litigation was noted in 51 A.J.I.L. 432 (1957).

AMERICAN CASES ON ENEMY PROPERTY AND
TRADING WITH THE ENEMY

Societe Internationale pour Participations Industrielles et Commerciales S.A. v. Brownell, 243 F.2d 254 (D.C. Cir., April 11, 1957), power of Attorney General to investigate books and records of a Swiss Banking House, noted *supra*, p. 818; *Brownell v. Nakashima*, 243 F.2d 787 (9th Cir., April 5, 1957), effect of tolling provision of statute; *Brownell v. Oehmichen*, 243 F.2d 637 (D.C. Cir., Feb. 28, 1957), factor of conditions in an internment camp; *De Wagenknecht v. Stinnes*, 243 F.2d 413 (D.C. Cir., April 18, 1957); *International Silk Guild Inc. v. Brownell*, 150 F. Supp. 545 (D.D.C., March 29, 1957); *Brownell v. Leutz*, 149 F.Supp. 98 (D.N.D., March 12, 1957), rights and interests acquired by Attorney General under vesting order; *Kober v. Brownell*, 149 F.Supp. 510 (N.D.Calif. Feb. 21, 1957), use of word "enemy" under the Act.

¹ 45 Stat. 2641.

² U. S. Treaty Series, No. 876.

AMERICAN CASES ON NATIONALITY

Citizenship. *Application of Reitmann*, 148 F.Supp. 556 (N.D.Calif., Sept. 18, 1956), effect of relief from military service; *Capetan v. Brownell*, 148 F.Supp. 519 (E.D. N.Y., Feb. 1, 1957).

Deportation. *U.S. v Witkovich*, 353 U. S. 194 (April 29, 1957), willful failure to give information to the Immigration Service where deportation order is outstanding; *Leng May Ma v. Barber*, 241 F.2d 85 (9th Cir., Feb. 5, 1957), status of alien after his application for admission to the U.S. has been denied; *Da Cruz v. Holland*, 241 F.2d 118 (3rd Cir., Feb. 12, 1957), failure to maintain non-immigrant visitors status; interpretation of "saving clause" of the Immigration Act; *Ferrerira v. Shaughnessy*, 241 F.2d 617 (2nd Cir., Feb. 13, 1957), *Foradis v. Brownell*, 242 F.2d 218 (D.C.Cir., Jan. 17, 1957); *Sigurdson v. Del Guercio*, 241 F. 2d 480 (9th Cir., Nov. 12, 1956), jurisdiction of the court to review administrative action under the A.P.A.; *Anderson v. Holton*, 242 F.2d 596 (7th Cir., April 4, 1957), judicial review of statutory ineligibility for relief; *Yee Si v. Boyd*, 243 F.2d 203 (9th Cir., April 10, 1957), application of 1880 treaty between China and U.S.; *Diego v. Holland*, 243 F.2d 572 (3rd Cir., April 26, 1957), alien obtaining unauthorized gainful employment; *Armodoros v. Robinson*, 241 F.2d 713 (7th Cir., Feb. 28, 1957); *Herrera-Roca v. Barber*, 150 F.Supp. 492 (N.D.Calif., April 12, 1957), concealment of marriage to an American citizen; *Anselmo v. Hardin*, 150 F. Supp. 293 (D.N.J., March 7, 1957), illegal entry; *Sevitt v. Del Guercio*, 150 F. Supp. 56 (S.D. Calif., March 27, 1957), discretion of board in suspension of deportation; *Alexander v. Butterfield*, 150 F.Supp. 75 (E.D.Mich., March 28, 1957), membership in Communist Party; *Frank v. Brownell*, 149 F.Supp. 928 (D.D.C., April 4, 1957), effect of failure to move for dismissal for lack of venue; *Carlisle v. Brownell*, 149 F.Supp. 855 (D.D.C., Jan. 31, 1957), request by alien for prior records; *Tsatsaronis v. Holland*, 149 F.Supp. 309 (E.D. Pa., Feb. 12, 1957), judicial review of Attorney General's refusal to suspend deportation; *Moutsos v. Shaughnessy*, 149 F.Supp. 116 (S.D.N.Y., Feb. 19, 1957), discretion of Attorney General in permitting voluntary departure by non-immigrant seaman; *Tsatsaronis v. Shaughnessy*, 149 F.Supp. 92 (S.D.N.Y., Dec. 27, 1956), effect of non-joinder of Attorney General as party to an application for review; *Earle v. U.S.*, 148 F.Supp. 822 (E.D.N.Y., Feb. 14, 1957), recovery of proceeds of departure bond; *Tsiang Hsi Tseng v. Del Guercio*, 148 F. Supp. 803 (S.D.Calif., Feb. 20, 1957), discretion of Attorney General to suspend deportation; *In re Cartellone*, 148 F.Supp. 676 (N.D.Ohio, Feb. 5, 1957), effect of re-entry to U.S. from Canada without a visa after a stay of one and one-half hours; *Valerio v. Mulle*, 148 F. Supp. 546 (E.D.Pa. Oct. 22, 1956), effect of a defect in the original arrest of an alien.

Naturalization. *Velasquez v. U.S.*, 241 F.2d 126 (2nd Cir., Feb. 11, 1957), effect of application for relief from military service; *Lopez v. U.S.*, 243 F.2d. 170 (9th Cir., April 24, 1957), sufficiency of less than ninety day service in the army for naturalization; *Petition of Yee Wing Toon*, 148 F.Supp. 657 (S.D.N.Y., Feb 14, 1957), sending money to China to aid mother not a crime involving moral turpitude.

Denaturalization. *U.S. v. Matles*, 150 F.Supp. 85 (E.D.N.Y., March 26, 1957), false statements in relation to membership in Communist Party; effect of failure to file an affidavit of good cause: *U.S. v. Lucchese*, 149 F. Supp. 952 (E.D.N.Y., July 3, 1956); *U.S. v. Kiros*, 149 F.Supp. 730 (E.D. Mich., Dec. 31, 1956); *U.S. v. Davis*, 149 F.Supp. 249 (E.D.Mich., Feb. 5, 1957).

Entry. *Forbes v. Brownell*, 149 F.Supp 848 (D.D.C., Jan. 31, 1957), conviction for bigamy in Canada does not bar admission to U.S.

Refugee Relief Act. *Lukman v. Holland*, 149 F.Supp. 312 (E.D.Pa., Feb. 19, 1957).

Miscellaneous. *The Peninsular and Occidental Steamship Co. v. U.S.* 242 F.2d 639 (5th Cir., April 3, 1957), liability of ship for bringing aliens not then in possession of valid visas to U.S., even though subsequently visas were granted by administrative action.

THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY: 1954-1957*

In the three years of its existence, the Court of Justice of the European Coal and Steel Community has already had an opportunity to exercise its rôle as guardian of the "rule of law"¹ of the new Community. The bulk of the judgments arose from complaints by the member states and by associations of coal and steel producers against actions taken by the High Authority, the principal executive arm of the Community. Some of these complaints led to a searching inquiry by the Court into the scope and nature of the powers conferred upon the High Authority by the treaty establishing the Community. The Court also reviewed several personnel actions by the Community organs at the request of the individual employees of these organs.

The first four judgments rendered by the Court (Cases 1-54, 2-54, 3-54, 4-54) involved the obligation imposed by the treaty upon the producers of coal and steel in the Community to publish their selling prices so as to reduce the chances of price discrimination and to facilitate price alignment by competitors.² In the exercise of its authority to determine the

* Prepared by Professor Eric Stein, University of Michigan Law School.

¹ Art. 31 of the Treaty Constituting the European Coal and Steel Community. The treaty was signed on April 18, 1951, on behalf of Belgium, France, the German Federal Republic, Italy, Luxembourg, and The Netherlands, and became effective on July 25, 1952. An English translation has been published by the High Authority. An English translation, without the Convention containing the Transitional Provisions, Annexes, and Protocols, can also be found in 46 A. J. I. L. Supp. 107 (1952).

² Judgment of the Court in Case No. 1-54: the Government of the French Republic v. the High Authority, Official Gazette of the European Coal and Steel Community (hereinafter referred to as Official Gazette), 4th Year, No. 1 (Jan. 11, 1955), p. 8; Judgment of the Court in Case No. 2-54: the Government of the Italian Republic v. the High Authority, *id.* at p. 23; Judgment of the Court in Case No. 3-54: the "Associazione Industrie Siderurgiche Italiane" (Assider) v. the High Authority, Official Gazette, 4th Year, No. 5 (March 1, 1955), p. 90; Judgment of the Court in Case No. 4-54: the Association "Industrie Siderurgiche Associate" (I.S.A.) v. the High

"extent" and the "form" of this obligatory publication, the High Authority authorized the steel producers to deviate from the published prices up to 2.5% upward or downward. This action apparently was designed to make the market more "flexible" and to stimulate competition. The High Authority also ruled that a deviation from published prices was not illegal where the seller was able to show that he had applied the same price to all "comparable transactions" or that the particular transaction was "unique." Upon complaint by the French and the Italian Governments,³ the Court annulled as contrary to the treaty that part of the decision of the High Authority which allowed the 2.5% deviation from the published prices. The Court listed the three purposes of the requirement of publication:

- (1) [to] prevent as much as possible the prohibited practices;
- (2) [to] give to the buyers the opportunity to acquaint themselves with the exact prices, and also to participate in the control of discriminations;
- (3) [to] give the enterprise [s] the opportunity to know exactly the prices of competitors in order to give them the possibility to align their prices.⁴

From these purposes and on the basis of an analysis of the treaty provisions the Court concluded:

Since the Treaty imperatively prescribes, for the above-mentioned reasons, the previous publication of the exact prices, it follows that the competence granted to the High Authority to establish the extent and the form of the publication does not empower it to impair the principle of the compulsory publication of the exact prices. . . .⁵

. . . the system of previous publication of exact prices constitutes the imperative principle prescribed by paragraph 2 of Article 60. It follows that this principle can not be eluded, not even for the benefit of a system better adapted to the objectives in view. It is not the task of the Court to give its opinion about the opportuneness of the system imposed by the Treaty nor to suggest a revision of the Treaty, but according to Article 31, the Court is bound to ensure the rule of Law in interpretation and application of the Treaty. . . .⁶

The Court has been especially preoccupied by the principle of free price-formation. It can not, however, justify another Decision. The Treaty starts from the idea that the free price-formation is guaranteed by the freedom given the enterprises to fix their prices themselves and to publish new price-lists when they want to modify them. If

Authority, *id.* at p. 94. For comment see Stein, "The European Coal and Steel Community: The Beginning of its Judicial Process," 55 Col. L. R. 985 (1955); Boulois, "Cour de Justice de la Communauté Européenne du Charbon et de l'Acier," *Annuaire Français de Droit International* (1955), p. 312; Daig, "Die vier ersten Urteile der Europäischen Gemeinschaft für Kohle und Stahl," 10 *Juristenzeitung* 361 (1955); Jerusalem, "Die ersten Urteile des Gerichtshofes der Montanunion," 8 *Neue Juristische Wochenschrift* 370 (1955).

³ Official Gazette, 4th Year, No. 1 (Jan. 11, 1955), pp. 8, 23.

⁴ *Ibid.*, pp. 15-16.

⁵ *Ibid.*, p. 18.

⁶ *Ibid.*, p. 20.

the economic situation changes, the producers are forced to adapt their price-lists, and it is in this way that "the market makes the price." But, although the Treaty starts from the idea of a free price-formation, it should not be forgotten that the Treaty forbids all discriminations and that it provides for the right of alignment. For these reasons the Treaty has established the principle of the compulsory and previous publication of the price-lists and conditions of sale. The Court has to abstain from giving its opinion about the opportuneness of this system, it can only ascertain that it has been prescribed by the Treaty which—rightly or wrongly—does not contain a text which permits a certain flexibility of the price-lists in the case of minor or passing fluctuations.⁷

The Court rejected, however, the plaintiff's allegation of *détournement de pouvoir* (abuse of power) as a ground for annulment: "Even if among the motives which do justify the action of the High Authority, there had been an unjustified one" (namely, the desire on the part of the High Authority to avoid having to punish producers guilty of deviating slightly from their published prices), "the Decisions would not, because of that, be vitiated by *détournement de pouvoir*, inasmuch as they do not infringe upon the essential objective which is the prohibition of the unfair competitive practices and discriminations."⁸

It is of interest to note that in seeking to delineate the powers possessed by the High Authority under the treaty, the Court relied heavily upon the introductory articles of the treaty setting forth the objectives of the Community in the broadest general terms:

The Articles 2, 3 and 4 of the Treaty . . . constitute fundamental dispositions establishing the common market and the common objectives of the community. . . . When giving the High Authority competence to define prohibited practices the Treaty compels it to take into account all the objectives prescribed by the Articles 2, 3 and 4. . . .⁹

Two Italian associations of steel enterprises contested the same decisions of the High Authority in Cases 3-54 and 4-54 with the same result.¹⁰

In Case 5-55¹¹ the Court was asked by an association of Italian steel enterprises to interpret its above-mentioned judgment in Case 2-54 brought by the Italian Government against the High Authority. The Court stated:

In an Interpretation-Judgment the Court can only determine the meaning and the scope of a former Judgment; the Court cannot rule on problems which have not been settled by that Judgment. Parties cannot, by way of interpretation, ask for a new decision in new disputes.

However, as both parties in question have explicitly declared that they wish an interpretation of the passage of the Judgment to which they give contradictory meanings, the Court is of the opinion that it

⁷ *Ibid.*, pp. 20-21.

⁸ *Ibid.*, p. 22.

⁹ *Ibid.*, p. 15.

¹⁰ Official Gazette, 4th Year, No. 5 (March 1, 1955), pp. 90 and 94, respectively.

¹¹ Judgment of the Court in Case No. 5-55: "Associazione Industrie Siderurgiche Italiane" (Assider) v. High Authority, Official Gazette, 4th Year, No. 17 (July 23, 1955), p. 270.

is advisable to re-state in the purview below the scope of its Judgment 2-54.¹²

After examining the scope of the judgment in question, the Court ruled that the issue raised by the request for interpretation had not been determined in the earlier judgment and cannot therefore be adjudicated in the form of an "Interpretation Judgment."

In Case 6-54¹³ the Court rejected an appeal by the Kingdom of The Netherlands for annulment of a decision of the High Authority fixing maximum prices for coal produced in the Ruhr Basin and in the Basin Nord and Pas-de-Calais. Under the treaty the High Authority is authorized to "fix for one or more products subject to its jurisdiction (a) maximum prices within the Common Market, if it finds that such decision is necessary to attain the objectives"¹⁴ of the Community, particularly "the lowest possible prices."¹⁵ The Court held that this provision was not intended to preclude price-fixing by the High Authority *in only a part* of the Common Market such as in the instant case and that the treaty conditions for the exercise of this power had been fulfilled. The Court agreed with the plaintiff that the coal-selling organizations in the two Basins may constitute monopolistic concentrations and agreements prohibited by the treaty and subject to direct remedial measures by the Authority; however, the Court noted that in accordance with its powers under the treaty the High Authority had provisionally authorized the continued existence of these organizations. The fact that direct measures against these organizations may eventually be justified did not preclude the Authority from exercising its right to set maximum prices. The Court pointed to the finding by the Authority that these organizations, because of their dominant position in the two Basins, would have fixed the prices regardless of the prevailing market conditions and not necessarily on lowest possible levels; this, according to the view taken by the Authority, made the fixing of maximum prices necessary:

The Court cannot examine the evaluation of the situation, based on economic facts and circumstances which led to the Decisions, unless the High Authority is alleged to have committed a "détournement de pouvoir" or to have obviously ignored the provisions of the Treaty. A study of the market situation which would include an evaluation of structural and conjunctural elements, would inevitably lead to such an examination.¹⁶

The allegation of "obviously ignoring the provisions of the Treaty" was put forward in the complaint in order to enable the Court to inquire into the market situation existing at the relevant time. The Court, however, without discussing at length the market situation, disposed of the allegation, saying that in view of the general objectives laid down for the Community institutions in Article 3 of the treaty, it did not follow "prima

¹² *Ibid.*, at p. 279.

¹³ Official Gazette, 4th Year, No. 7 (March 28, 1955), p. 119.

¹⁴ Art. 61(a) of the treaty.

¹⁵ Art. 3(e) of the treaty.

¹⁶ Official Gazette (note 13 *supra*), p. 131.

facie from the level of the prices fixed by the High Authority that the given Decisions were not necessary. Under this Article the High Authority has to make sure that certain economic circumstances are realized, and this can justify preventive action by the High Authority. . . ."¹⁷ The Court also rejected the allegation of *détournement de pouvoir*.

Joint Cases 7-54 and 9-54¹⁸ concerned the validity under the treaty (a) of a compensation scheme enacted by the Luxembourg Government by which *industrial* coal consumed in Luxembourg was assessed for the purpose of subsidizing *household* coal producers, and (b) of a monopoly on import of coal set up by the Luxembourg Government. The plaintiff—an association of steel producers in Luxembourg—first asked the High Authority to declare these arrangements (enacted by plaintiff's own government) as contrary to the treaty. After the High Authority had failed to act on this request within the time specified in the treaty, the plaintiff appealed to the Court against the "implied negative decision" of the Authority.¹⁹ The Luxembourg Government was allowed by the Court to intervene in the proceeding. While the proceeding was in progress the Authority declared the import monopoly scheme inconsistent with the treaty, making it unnecessary for the Court to rule on one of the two counts in the plaintiff's complaint. With reference to the compensation scheme, however, the Court held that the levy imposed on industrial coal in support of household coal consumption was not a "special charge" incompatible with the Common Market under Article 4(c) of the treaty, since it applied equally to all consumers in "comparable situations" in Luxembourg and affected all the producers of the Community who sold in Luxembourg; nor did it constitute a discriminatory measure within Article 4(b) of the treaty. The Court stated in this connection:

There is no provision in the Treaty that provides for the equalization of the charges imposed by the member States in the fields falling under their respective jurisdiction;

On the contrary, Article 26 proves that the Treaty has not deprived the member States of their responsibility for the general economic policy as it instructs the Council "to harmonize the action of the High Authority and that of the governments which are responsible for the general economic policy of their countries";

It follows from Article 67 that any action by a member State which might have appreciable repercussions on the conditions of competition in the coal and steel industries falling under the jurisdiction of the Community, is not necessarily abolished and prohibited by the Treaty and therefore does not necessarily constitute a measure or practice which establishes a discrimination prohibited by Article 4 b of the Treaty; indeed Article 67 authorizes the High Authority to

¹⁷ *Ibid.*, p. 132.

¹⁸ Judgment in Joint Cases 7-54 and 9-54: *Groupeement des Industries Sidérurgiques Luxembourgeoises v. the High Authority*, Official Gazette, 5th Year, No. 16 (July 10, 1956), p. 190.

¹⁹ Under Art. 35 of the treaty, a party may appeal to the Court against the High Authority's inaction as an "implied negative decision" provided due demand was made upon the High Authority to take action.

compensate, through the grant of an aid, and therefore to tolerate and practically to authorize under certain conditions the harmful effects of these repercussions on competition.

Furthermore, Article 67, which is very carefully worded, provides only for an intervention of the High Authority with regard to actions by member States which have "appreciable" repercussions on the conditions of competition in the coal and steel industries or which are liable to give rise to a "serious disequilibrium" by "substantially" increasing differences in the costs of production otherwise than through variations of productivity. . . .²⁰

The persistence of differences in the conditions of competition is the necessary and inevitable consequence of the incomplete nature of the integration realized by the Treaty, and it does not imply a discrimination prohibited by the Treaty. . . .²¹

Pointing to the finding of the High Authority that the compensation scheme could not affect competition in the sale of coal or steel products because of its small repercussion upon the price of the steel produced in Luxembourg, the Court said:

The most the High Authority could have done, had it deemed that the action of the Luxembourg Government produced harmful effects for coal and steel enterprises falling under the jurisdiction of said Government, was to authorize this Government to grant an appropriate aid to those industries. . . .²²

Finally, the Court held, the levy was not inconsistent with the decisions of the High Authority fixing maximum prices as these bound the *producers* while the levy was applied at the *distribution or consumption* level. On these grounds the Court rejected the complaint.

Another plaintiff, the *Association des Utilisateurs de Charbon du Grand-Duché de Luxembourg*, complained against the same "implied negative decision" of the High Authority in Joint Cases 8-54 and 10-54.²³ In these cases, the Court rejected the complaint on the ground that the plaintiff, an association of *consumers*, had no standing before the Court under the treaty which admits only associations of *producers* as parties before the Court.

Case 8-55 between the *Fédération Charbonnière de Belgique* and the High Authority,²⁴ heard jointly with Case 9-55,²⁵ dealt with the application of the "Convention Containing Transitional Provisions"²⁶ concerning the gradual adaptation of the production to the Common Market conditions. Under this convention Belgian and Italian coal producers en-

²⁰ Official Gazette (note 18 *supra*), p. 213.

²¹ *Ibid.*, p. 214.

²² *Ibid.*

²³ Judgment of the Court in Joint Cases 8-54 and 10-54: The Association des Utilisateurs de Charbon du Grand-Duché de Luxembourg v. the High Authority, Official Gazette, 5th Year, No. 16 (July 10, 1956), p. 219.

²⁴ Journal Officiel de la Communauté Européenne du Charbon et de l'Acier, Sept. 24, 1956 and Jan. 23, 1957, p. 25.

²⁵ Arrêt de la Cour dans l'affaire No. 9-55 entre la Société des Charbonnages de Beeringen (et al.) et la Haute Autorité, Journal Officiel, Jan. 23, 1957, p. 39.

²⁶ Note 1 *supra*.

joy special protection during the transitional period because of the many "marginal mines" in Belgium and Italy. The purpose of this protection is to render these mines competitive within the Community by the end of the transitional period (February 10, 1958). Belgian producers received assistance from a compensation fund financed through levies upon the coal production in member countries whose mining costs were below the Community average.

The complainants in the two cases under consideration contested (a) a decision by the High Authority modifying the selling prices of Belgian coal; and (b) the decisions of the Authority authorizing the withdrawal or reduction of compensation payments paid from the compensation fund to certain Belgian enterprises. The Court upheld the right of the High Authority under the above-mentioned convention to fix the Belgian selling prices for the purpose of reducing the price levels, provided that the prices so fixed bear a proper relationship to the cost of production of Belgian coal expected to be prevailing at the end of the transitional period, and provided also that they approach as closely as possible the Common Market prices. The complainants alleged *détournement de pouvoir*, one of the two grounds which permit the Court to review the economic evaluations of the High Authority. In the course of such review the Court inquired into the relationship of cost of production and price, into the propriety of the "base year" (year of reference) chosen by the High Authority, and into the justification of the categories of products selected by the Authority. The Court found no evidence that prices were set arbitrarily or that their alignment with the prices of Ruhr coal (the lowest in the Community) was improper in view of the "price leadership" of Ruhr coal within the Community. No abuse of power or error in economic judgment was found. Even if the Authority in fixing the prices had sought to achieve other objectives in addition to that of lowering the price level, such as structural change in the Belgian production,²⁷ as alleged by the plaintiff, this would not constitute *détournement de pouvoir* "... because it [the High Authority] would have envisioned the effects which would have been inevitably and under all circumstances the consequences of the lawful purpose of its action."²⁸

The Court also upheld the decisions by the High Authority relative to the withdrawal of compensation payments from individual Belgian producers, since these payments were subsidies rather than "guaranteed income" and could therefore be reduced or withdrawn when they had accomplished their purpose of helping the integration of Belgian coal into the Common Market or when an individual enterprise failed to co-operate adequately "in the work of reorganization and re-equipment."²⁹ In the absence of evidence of arbitrary action or discrimination, the Court held, the

²⁷ I.e., by withdrawing compensation payments from certain "marginal mines," thus rendering them unable to compete, for instance, with the Ruhr coal mines, and forcing them to shut down.

²⁸ Author's translation from Journal Officiel, Jan. 23, 1957, p. 32.

²⁹ Journal Officiel, Jan. 23, 1957, p. 37.

High Authority did not violate the convention or the treaty by giving the Belgian Government authority to withdraw or reduce these payments.

At the opening of the Common Market there existed a single sales outlet for the all-important Ruhr coal. Case 2-56³⁰ was a by-product of a reorganization scheme designed to limit the sales monopoly in the Ruhr and establish three independent sales agencies in place of the single one. The agreements worked out to this effect by the Ruhr industry required approval by the High Authority. Without such approval they would be contrary to Article 65 of the treaty which prohibits agreements among enterprises tending to restrict or distort the normal operation of competition and particularly to allocate markets, products and consumers. The High Authority may approve such agreements if it is satisfied that they are essential for an improvement in the production or distribution, and are not unnecessarily restrictive and monopolistic. The High Authority gave the necessary approval with the exception of a single clause concerning one of the qualifications which a coal dealer would have to meet to achieve the status of a wholesaler. The plaintiffs in the instant case—nineteen Ruhr coal producers who had entered into the agreement forming one of the three sales agencies (the “*Geitling*”), and this sales agency in its own right—appealed to the Court, charging that the High Authority had violated the treaty by excluding the qualification clause from its approval of the “*Geitling*” agreement. Under the contested clause a dealer, in order to qualify as wholesaler, would have to sell 12,500 tons of Ruhr coal bought from one of the three sales agencies (in addition to the same amount of coal bought exclusively from “*Geitling*”). In holding that the agreement was one requiring High Authority approval the Court sustained the exclusion of this qualification clause from the approval. Since identical clauses were proposed for inclusion also in the agreements establishing the other two agencies, the Court concluded that by approving the clauses the Authority would have “practically approved a sort of cartel of all coal producers in the Ruhr basin”;³¹ this would have defeated the objective of setting up three *independent* sales agencies with policies of their own.

The plaintiffs’ main contention was that the High Authority had based its decision on Article 4(b) of the treaty (which prohibits discriminatory practices) rather than determining the case *solely* on the strength of Article 65, which permits authorization of the agreement if it is designed to ameliorate distribution and is not unnecessarily and excessively restrictive. The Court felt, however, that the contested clause was more restrictive than was necessary to achieve the lawful purpose of the agreement under Article 65; that article, moreover, in no way superseded the provisions of Article 4 so that in considering the authorization under Article 65 the Authority had to bear in mind the injunction in Article 4(b) against measures

³⁰ Arrêt de la Cour dans l’affaire No. 2-56 entre les sociétés minières du bassin de la Ruhr groupées au sein du Comptoir de vente du Charbon de la Ruhr “*Geitling*,” et al., et la Haute Autorité, Journal Officiel, April 16, 1957, p. 166.

³¹ *Ibid.*, p. 179.

discriminating against producers, buyers and consumers. The clause was discriminatory both with respect to producers (in that it would favor Ruhr producers over other producers in the Community) and with respect to buyers (in this case the dealers, who would suffer discrimination if they should fail to buy 12,500 tons from the Ruhr sales agencies). On these grounds the Court rejected the complaint.

It is interesting to note from this brief survey that in the short period of its existence the Court has been called upon to review decisions of the High Authority in practically all the major fields of its activities under the treaty: defining prohibited discriminatory practices and enforcing the prohibition of such practices; fixing maximum prices under conditions specified in the treaty; helping non-competitive producers to achieve competitive levels; applying the anti-monopoly provisions of the treaty.*

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BOOK REVIEWS AND NOTES

What is Justice? Justice, Law and Politics in the Mirror of Science.
Collected Essays by Hans Kelsen. Berkeley and Los Angeles: University of California Press, 1957. pp. viii, 397. \$7.50.

This volume collects fifteen essays published by Dr. Kelsen in American journals from 1938 to 1956. They all seek to elucidate his pure theory of law, and there is inevitably a good deal of repetition. The essays fall into three groups, dealing respectively with the meaning of justice, the relation of law to justice, and the relation of science to law, justice and politics.

The gist of the first group is in the first essay, "What is Justice?" The author seeks to discover universal and eternal criteria of justice in varied writings on the subject—religious, philosophical, political, and economic—but his quest is void. Consequently, he concludes that justice is relative and subjective. It is a matter of faith, not of reason. At the end of the essay he declares his own faith:

Since science is my profession, and hence the most important thing in my life, justice, to me, is that social order under whose protection the search for truth can prosper. "My" justice, then, is the justice of freedom, the justice of peace, the justice of democracy—the justice of tolerance. (p. 24.)

The next five essays examine in detail the idea of justice in the Old and New Testaments, in Plato and Aristotle, and in various natural law theories from Grotius, Pufendorf and Locke to Hegel, Marx and John Wild. The analyses display independence and logical acumen and result in full support for his thesis that justice is a subjective and relative concept. These theories, he finds, are internally inconsistent and inconsistent with one another. No general conception of justice emerges from them.

The next six essays examine the pure theory of law from various points of view. As is well known, this theory makes a sharp distinction between the "is" of natural science and sociology and the "ought" of law and other normative sciences. Among the latter, law is concerned with norms that are "valid" in the sense that they are sanctioned by an organ authorized directly or indirectly by the basic or *grund* norm of the legal order, and that they are in considerable degree "effective" in the sense that they are not too frequently violated by the subjects of this legal order. Validity does not in this theory depend on the content of the norm. The norm may be unjust, immoral or inexpedient, but if it is "valid" and "effective" in the legal order, it is law. The term "state" does not appear in the definition because it is simply a form of legal order, the basic norms of which are asserted in the constitution. The state, however, is not the only form of legal order. International law also establishes a legal order, superior indeed to that of the states, its basic norm being the principle

that international custom shall be observed. Among the most important principles established by international custom is *Pacta sunt servanda*. Kelsen rejects a pluralism of international law and national law systems, and also national monism. He accepts international monism, the theory of just war, the obligation of states to enforce international law in their respective jurisdictions, and the validity under international law of any national legal order which is established in fact (pp. 263-287).

The essays in this section argue that the pure theory of law, which conceives law as a specific social technique, manifests relativism as opposed to absolutism in philosophy, democracy as opposed to autocracy in politics, and objectivity as opposed to subjectivity in legal judgments. The question "Why should the law be obeyed?" can be answered only conditionally. It must be obeyed if one regards legal order as essential to social living (p. 262); that is, if one believes *Ubi societas ibi jus est* (p. 239). This argument does not assume that some particular legal order is essential for society. If it did, there would be no reason for obedience to law where a different legal order exists. The relativism of law is indicated by the *de factoism* of international law. That law rests upon custom which changes, gradually but continually, and which recognizes the validity of national constitutions which emerge from revolutionary change as soon as they are established in fact (p. 287).

Kelsen recognizes the similarity of the pure theory of law to analytic jurisprudence in general, and particularly to the positivism of John Austin. But he believes it superior to this system because it is able to ascribe a legal character to international law and to identify the state with legal order. It achieves these advantages because it makes the valid norm its central conception rather than, as does Austin, the command of a political superior. The latter idea suggests the priority of politics over law, and does not isolate the legal order, which itself provides for its own change, as an independent subject of analysis. To Kelsen, while "commands" or "acts of will" may create norms, they do so only when authorized by existing norms within the legal order. While revolutionary change of a national legal order is recognized by international law when established in fact, it cannot be recognized as legal by the pre-existing national legal order (pp. 279 ff.).

The gist of Kelsen's pure theory is expressed most vigorously in the polemical essay in reply to an article by G. Merle Bergman, who had defined law as "the means by which the political community endeavors to realize its paramount interest in maintaining the peace and order of the area" (pp. 288, 391). Without denying that law can serve such social goals as peace, welfare, and ideas of justice, Kelsen insists that the science of law must confine itself to the analysis of law as a "specific social technique" which could serve innumerable purposes. Study of the values which it has served or can serve lies outside its scientific study.

The last three essays in the volume discuss the origin of the idea of causality basic in contemporary science. It developed from the idea of retribution found among primitive peoples who are dominated by animism

and conceive nature as an extension of society, in reverse of modern sociology, which conceives society as derived from nature. According to Kelsen, nature and its causal laws were first distinguished from social laws by the Greek atomists Leukippos and Demokritos. At about the same time the distinctive characteristics of political and social law were identified by the Sophists, especially Protagoras (p. 311). Remnants of the old animism, associating causality with retribution, have, however, continued to recent times in concepts of both science and law.

Kelsen uses the term "imputation" (*Zurechnung*), implying that its subject is responsible (*Zurechnungsfähig*), to distinguish normative relations from natural relations of causality (p. 327). Normative relations imply freedom of the subject. He can violate norms. They describe not what is, but what ought to be. Modern scientific ideas of Einstein's relativity, Planck's quanta, and Heisenberg's uncertainty cannot, in Kelsen's opinion, explain freedom of the will. Freedom can only rest upon a complete separation of the realm of causality from that of responsibility.

In the final essay on science and politics Kelsen concludes:

To avoid the mingling of these two heterogeneous spheres (law and politics) is as essential for the preservation of the scientific character of jurisprudence as the separation of science from politics is a vital condition for the existence of all independent science. (p. 375.)

While these essays are not light reading, the careful student cannot but be impressed by Kelsen's profound knowledge of the sources he discusses—religious, classical, philosophical, anthropological, and historical; by his cogent analyses of these sources; and by the logic of his arguments. Many will remain unconvinced by his fundamental thesis.

Kelsen seeks to exemplify the scientific virtues of exactness and logic in the study of law, a field more resistant to this kind of treatment than is physics. Observation discloses that the interpretation of legal norms and hierarchies of authority have been uncertain, have continually been changed, and have been influenced by concepts of justice, currents of opinion, and pressures of politics. The effort to abstract a pure science of law from this reality is difficult, and may ignore a basic characteristic of law, namely, that it is but one of numerous interdependent functions of society. While admitting the analytical possibility of separating the concept of law from that of justice, one can question the pragmatic profitability of doing so. One can agree with Kelsen that all ideas of justice are relative, that no universal criteria have been discovered, and that no eternal criteria are likely to be discovered, without agreeing that concepts of justice are entirely individual. Anthropologists find concepts of justice characteristic of each primitive culture; historians find concepts of justice characteristic of each nation and civilization; and courts continually read contemporary ideas of justice into the law they administer. This was true of Roman *praetors* and *jurisconsults* who developed the positive law by concepts of the *jus gentium* and the *jus naturale*; by British judges who continually modified the law by reference to the rule of reason and equity; by the Supreme Court of the United States which has continually interpreted

"due process" and "equal protection of the laws" with reference to developing opinions about what justice requires, never more notably than in the recent school segregation case. The International Court of Justice is by its statute formally instructed to utilize "the general principles of law recognized by civilized nations" in interpreting treaties and custom. Law cannot be understood without reference to the conceptions of justice which continually influence it, even though these conceptions are relative to a particular culture, to a particular society, to a particular time, and to particular circumstances.

Attempts at total separation of the "is" and the "ought" of a society obscures the dynamic relationship between the different aspects of a society which may be changing at different rates ("social lag"), and therefore between the past, the present, and the future of the society, particularly if it is a progressive society. The "is" is continually modified by the "ought" and the "ought" is continually becoming the "is," through the efficacy of legislation, interpretation and sanctions. Furthermore, the "ought" is a function of the "is." Efforts to divorce human prescriptions from human nature, social ordinances from the nature of society, positive law from natural law, neglect Shakespeare's common sense:

"Yet Nature is made better by no meane,
But Nature makes that meane." (Winter's Tale, IV, 4.)

It is natural for man in societies to utilize the specific technique of law.

The reviewer, therefore, continues unconvinced that the study of law can be entirely separated from the study of other aspects of society, whether normative or causative, whether technological, political, economic, social, religious, or moral. This applies particularly to relations between law and justice, and especially in the international field where the play of power politics and of rival ideologies continually threatens the very existence of law. Those who expound and apply international law must continually reappraise its norms in the light of the total situation of international relations. They cannot leave this task to a world legislature because there is none. It is a task which jurists, statesmen, and judges cannot ignore. They must appreciate that with all the uncertainty and relativity of conceptions of justice, history marks progress toward universalism with the extension of communication; with the comparison of different parochial systems—legal, moral and religious; and with the formulation of standards by international bodies. Universal standards of justice or "natural law," which Kelsen vainly seeks, can never be established with complete objectivity. So long as human society remains progressive, there will always be pressures for reform. But such standards may be described as a limit, which man approaches by an evolutionary process as he develops a more universal society and a more comprehensive knowledge of himself. The idea of a law, natural in the sense that it permits realization of the moral nature of man in the highest degree possible under the conditions of a continually advancing science and technology, is likely to continue as a source of positive law, especially of international law, in the future as it

did in the formative years of that law, when, for the first time, the great civilizations of Europe, Asia and America came into continuous contact with one another.

QUINCY WRIGHT

Law and Structures of Social Action. By Kenneth S. Carlston. London: Stevens and Sons, Ltd.; New York: Columbia University Press, 1956. pp. xii, 288. Index. \$5.50.

The central theme of Professor Carlston's stimulating book is the function of law as a means of social control of deviant behavior in facilitating organized group activity. Behavior is defined as "deviant" when it interferes with effective rôle performance within the group and thus reduces the efficiency of the group in achieving its goals or disturbs its equilibrium. Organization, whether in the form of the private corporation or otherwise, is regarded as essential for the achievement of the economic and political goals of modern industrial society, and the modern state is said to represent an adjustment to the conditions and demands of that society.

The book is in effect a collection of essays in which the author's central concepts are applied to such diverse fields as legal history, the democratic *vs.* Communist state, international relations, public and private international law, antitrust legislation, labor relations, and civil service in national governments and international organizations. It is not surprising that equal justice is not done to all of them. The extensive analysis of judicial decisions in the chapter on antitrust law stands in contrast to the sketchiness of the chapter on "world society." The challenge to the adequacy of private international law from the standpoint of international business needs to be reinforced by concrete illustrations. Some formulations are superficial. In the light of the author's convincing strictures on the conceptualism of many traditional definitions of law and the state, it is surprising to find him saying that in the democratic state the problem of *quis custodiet ipsos custodes* is solved by the judges being "subject to the law" and "bound by precedent."

Professor Carlston regards custom and treaties as inadequate sources of public international law and suggests "an entirely new approach":

Need international lawyers, in their search for rules of law, emphasize those cases in which disputes have arisen between States and a rule of law has been conceded to apply? May not obligatory norms for behaviour be found otherwise than in situations involving deviant behaviour? May not international lawyers go directly to the examination of the expectations implicit in the roles themselves? Might they not resort to a technique of comparative law to determine a consensus in the laws of the several States which would reveal that which is obligatory therein? Might they not take as starting point the function and purpose of the particular role under investigation?

These questions point in the direction of natural law and "general principles of law"—approaches that are hardly entirely new. In his strictures

on international law, the author tends to over-emphasize the rôle of violence in international relations. The statement that "under present conceptions there seem to be little legal controls over the initiation of war" is of questionable validity. And it is hardly relevant to a serious effort to understand the modern functions of either treaties or war to say that "the treaty relationship is one voluntarily assumed and may be terminated at will, subject to the risk of war."

It is to be hoped that Professor Carlston will consider his interesting book as a starting point in the development and application of his many challenging and fruitful concepts and insights.

O. J. LISSITZYN

Studia nad genealogia nauki prawa narodow. Sprawozdania Polskiej Akademii Umiejetnosci. By Ludwik Ehrlich. Reports of the Polish Academy of Learning, Vol. LII. Krakow: 1951. pp. 677-684.

Pawel Wlodkowic i Stanislaw ze Skarbimierza. By Ludwik Ehrlich. Warsaw: State Scientific Publications, 1954. pp. 238.

The two studies reviewed here belong to a series of contributions which Professor Ehrlich refers to as a "genealogy of the science of international law." (The third study is reviewed separately below.)

The author's long-standing interest in this subject is shown in extensive chapters on the history of international law and of its science in his *Course on International Law* (in Polish), and in a study, "The New Positivism in International Law," which appeared in *Annals of International Law and International Relations* (1938).

The second World War constitutes a dividing line between the two periods of thought in our author's studies of the history of the science of international law. In the first study he endeavors to establish Grotius' indebtedness to Gentile. This preliminary work, done in the prewar years, made Professor Ehrlich's new approach to the genealogy of international law possible. Although doubts as to the stature of Grotius, acclaimed "the father of international law," are, as Professor Ehrlich demonstrates, at least a century old and have been constantly gaining strength, nevertheless, the Grotius legend is still widespread. It is based on the conviction that the Reformation, which destroyed the religious unity of the civilized world, produced a new international community, differing basically from the previous international order. The new law of war and peace was designed for the new community of nations which came into being by rejecting the ideological and legal foundations of the old one, and consequently Grotius stands as the innovator and path-blazer of the new system of ideas.

In the first of his postwar contributions, a report to the Polish Academy of Learning (which must be distinguished from the Polish Academy of Science created under the present regime and modeled on the Soviet Academy of Science), our author outlines the genealogy of international

law and traces it back to Canon Law and the Canonistic writers of the 13th century for the formation of the modern ideas of the law of war. The most important of those was Raymond de Penjafort, a Dominican, whose *summa conscientiae* (circa 1240) contains in the second volume a separate chapter devoted to the question of war, and among others defines five conditions of a just war. This work was followed by others of the same type, leading finally to Lignano's *De bello, de represaliis et de duello* (1360). Other works on the law of war which followed up to Gentile and Grotius were a continuation and development of the Canonistic ideas on the law of war.

As a matter of fact the brilliant work of Grotius contributed little to the law of peace, as his *ius pacis* deals with the rules governing the conclusion of peace. Thematically *De iure belli ac pacis* has remained within the scope of the Canonistic studies of the law of war. Grotius, in Professor Ehrlich's opinion, represents merely the last link of the Canonistic period.

Against this historical background outlined in his Academy report, Professor Ehrlich considers in his next two books (in 1954 and 1955) the works of two Polish scholars active at the beginning of the fifteenth century, Pawel Wlodkowic and Stanislaw of Skarbimierz, who formulated what Professor Ehrlich calls the Polish school of the law of war. In contrast with their predecessors, the two Poles refrained from considering issues other than that of war between states. Both were active at the University of Crakow, which, endowed and renovated by King Wladyslaw Jagiello, was beginning the period of its greatness and influence. The main contribution of Stanislaw to the science of international law was in the form of the sermon, "*De bellis iustis*," while Pawel's views on the same subject were formulated in a series of short studies circulated among the participants of the Council of Constance (1414-1418), which assembled to settle, among others, the dispute between the Polish Lithuanian Kingdom and the Teutonic Order.

Professor Ehrlich points out that all important contributions to the study of the law of war during the Canonistic period were made in connection with an important political and practical issue. Grotius' *De iure belli ac pacis* is fundamentally based on his *De iure praedae* which he wrote in defense of the right of a Dutch company to a Portuguese ship captured on the high seas. The Spanish school of international law came into being primarily in connection with the conquest of South America and the moral and legal problems arising in connection with the expansion of the Spanish Empire. Similarly Polish scholars were endeavoring to justify the legality of the defensive wars fought by the Poles and Lithuanians against the encroachments of the Teutonic Order which, having lost the battle of Grunwald (1410), and threatened in its possession of Prussia, endeavored to stay the hand of the Polish King by complaining to the Pope and the Emperor. In defense of the Polish position the two scholars had to justify the alliance of a Christian Kingdom with a heathen state, the right of the pagan nation to have and maintain its state, to discuss the

rules of war between a pagan and a Christian nation, and to challenge the legal validity of Papal and imperial grants of pagan lands to a monastic order.

The book has two appendices: one containing a facsimile, a Latin transcription, and a Polish translation of one of the treatises by Pawel Wlodkowie, and the other a short chapter by the editors giving an appraisal of Professor Ehrlich's work, which, however praiseworthy, is only a step in the proper analysis of the work of the two Polish scholars of the 15th century in terms of Marxist dialectics. Curiously enough, the second book, specifically dealing with the work of Stanislaw of Skarbimierz, has been spared a similar piece of orthodoxy, perhaps as a result of the changing atmosphere which was already taking place at that time, consequently resulting in a greater respect for the autonomy of scholarly research.

KAZIMIERZ GRZYBOWSKI

Polski Wykład Prawa Wojny XV Wieku. Kazanie Stanislawo ze Skarbimierza de Bellis Justis (A Fifteenth-Century Polish Exposition of the Laws of War. A Sermon of Stanislas of Skarbimiria de Bellis Justis). By Ludwik Ehrlich. Warsaw: Wydawnictwo Prawnicze, 1955. pp. 268. Index.

This book, in Polish, but including not only the Latin texts discussed therein but also an excellent English summary, fully deserves the attention of people interested in the history of international law. Its value is due not only to the intrinsic merits of the early 15th-century discussion of war and related matters, but also to the painstaking and scholarly comments by Professor Ludwik Ehrlich, whose profound knowledge of the history of international law is well known.

The two medieval texts reproduced in the book treat related matters. The main text is a sermon (the medieval equivalent of a lecture) pronounced by Stanislas of Skarbimiria, the first Rector (President) of Cracow University, who served in this capacity in 1400 and again in 1413 and who also taught canon law at the same university. He and his colleague, Paulus Vladimiri, one of the Polish Ambassadors to the Council of Constance in 1415-1417, share the distinction of heading the contemporary Polish school of legal doctrine. Both were interested in the problem of just wars and defended similar views. The other text reproduced in the book is a short note by an unknown author, obviously a member of the same school of thought.

Both texts provide, first of all, an interesting example of the eternal bond linking international law to international politics. The Cracow lawyers were confronted with an important political and moral problem. Poland was tied by a personal union to largely pagan Lithuanians, and both countries were menaced by the aggressiveness of the Teutonic Order which had unfriendly relations with Poland and was trying to enlarge its territorial possessions at the expense of Lithuania under the pretext of converting the pagans. Could Poland fight a war against a Christian Order and ally

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herself for that purpose with a pagan state? Could she moreover enlist the services of heretical Czech Hussites?

Stanislas provided the answers politically useful to his country, but his arguments led him to an almost modern view of the international community, a view which one would hardly have expected from a medieval lawyer. His central idea was that natural law was by the will of God binding alike on all human beings, Christians and pagans alike. Hence the pagans had a natural right to possess their own states, to defend their territorial dominions, and to conclude alliances with Christian states for the purpose of waging just wars (mainly of self-defense). After thus extending the benefits of the Christian doctrine of just wars to the pagan states, Stanislas discussed the various implications of that doctrine (for instance, limiting the right to war damages to the parties waging a just war and denying this right to the monarchs engaged in an unjust war). Unlike the Western medieval lawyers, he confined his analysis to the topic of public wars waged between states and paid no attention to the private wars between feudal lords; the latter problem was of no interest to Poland, which was by that time a consolidated national state. Considering that natural law forbade waging unjust wars even on the pagans, he denied the right of the Pope to authorize such wars, even for the purpose of converting the pagans.

The author of the anonymous note went even further, claiming that a just war was a good deed that justified the request for assistance by anyone, including the heretics.

Professor Ehrlich in his commentary, which takes by far the major part of the book, traces the influence on Stanislas of the earlier authorities (St. Augustine, St. Thomas Aquinas, Pope Innocent IV, Raymond of Penjafort, William of Rennes, and others) and thus brings forth what is original in the Cracow lawyer's contributions. He also compares his views with those of later writers.

The book under review was published in 1955, a long time before the "thaw" in Poland. One cannot refrain from paying homage to Professor Ehrlich for his withstanding contemporary pressure and producing a thoroughly scholarly book which does not contain a word of the then routine tribute to Marxism-Leninism. A man of lesser stature would not have failed at that time to mention at least Lenin's theory of just and unjust wars.

W. W. KULSKI

Luftkrieg und Menschlichkeit. Die völkerrechtliche Stellung der Zivilpersonen im Luftkrieg. By Eberhard Spetzler. Göttingen: Musterschmidt Verlag, 1956. pp. viii, 451. Index.

The author of this book, a doctor of law and a former officer of both the German Air Force and the German General Staff, investigates the law of air warfare. His object is doubly limited: He investigates only the position of the civilian population under international law and only with

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regard to independent air war, to strategic aerial warfare in the hinterland of the enemy or in territory occupied by the enemy. For tactical air warfare in connection with operations of the army is governed by the law of land warfare, which governs also the legal position of the civilian population in the area of military operations. Making use of the complete technical, historical and legal literature in all the principal languages (bibliography, pp. 397-414), he gives the history as well as the development of strategic air warfare and of its law.

There is not yet, of course, a special treaty law of air warfare and the few norms of treaty law are no longer in force. Even the Geneva Conventions of 1949 are not designed to protect the civilian population as such against the dangers of indiscriminate strategic air warfare. Yet a few basic principles of the law of war are still the law and apply also to aerial warfare. The greater part of the book investigates the historical development of the customary law of strategic air warfare. Prior to the first World War the distinction between armed forces and civilian population was axiomatic. The development in the first World War led to a common conviction that independent air attacks on the hinterland are legal, but only against military objectives; attacks against non-military objectives were only justified as reprisals, or were condemned as violations of the laws of war.

In the period between the two world wars the laws of war were disastrously neglected: on the one hand, there was the illusion that war had been "abolished"; on the other hand, the working out of the theory of "total war," particularly by the Italian General Douhet. Critically the author states that Douhet has, with the eye of genius, seen the new concept of strategic air warfare; he has seen correctly that a modern war cannot be won if the enemy has aerial supremacy; but he has overestimated the possibilities of this type of war. For whereas land warfare, and therefore also tactical air warfare, has as its aim the occupation of enemy territory, strategic air warfare aims at destruction only. While the distinction between armed forces and civilian population remained recognized, it lost in value by continuous attempts to reduce the concept of "civilian population" and to enlarge the concept of the "military objective." Yet, between 1920 and 1939 and at the beginning of the second World War all nations strongly condemned indiscriminate aerial bombing of the civilian population.

In the second World War the United Kingdom underlined from the beginning the importance of strategic bombing, whereas Hitler Germany put the emphasis on tactical warfare in co-operation with the army. The German Luftwaffe had been built for tactical air warfare and that explains the German failure in the air battle for London. The author objects to the Allied evaluation of the German aerial bombing of Warsaw and Rotterdam, as these were operations of tactical air warfare in the zone of military operations, destined to occupy, not merely to destroy, and hence governed by the law of land warfare analogous to bombardment of a besieged city.

The decisive turn, according to the author, came with the resolution of

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the British Cabinet of May 11, 1940, which sanctioned strategic air warfare on the enemy's hinterland, although at the beginning restricted to military objectives. But as British bombardments were mostly carried out by night, a real target-bombing of military objectives, a real distinction between military and non-military objectives was already technically difficult. It was only on August 8, 1940, that Hitler started attacks against non-military objectives, such as the attack against Coventry; and they were designated as reprisal attacks. It was precisely the German failure in the air battle for London which disproved Douhet's theory that air warfare alone can vanquish a strong country, that even indiscriminate bombing can break the morale of a vigorous nation; to the contrary, it only makes the resistance stiffer and more embittered. The air battle against London, the author holds, only had a chance if the German Luftwaffe had been built for strategic air warfare and even then only in connection with an invasion of the country. The German failure in the battle for London proved, according to the author, the futility of such endeavor, constituting a merciless killing of the civilian population without even a military result.

The British, in spite of their own experience in the air battle for London, resorted to strategic air warfare against the German hinterland in 1941-1944, which the author holds was illegal and, from a purely military point of view, worthless. For in spite of the enormous destruction of German cities, the very great losses in civilian population, German war production constantly increased until 1944; British indiscriminate bombing neither broke Germany's industrial capacity nor her morale, just as Germany's bombing of London had no such effect on Great Britain. It was American aerial bombardments, carried out by day, directed at genuine military objectives, such as oil and communications, provoking no excessive killings of the civilian population, which had the greatest military effect and in a few months rapidly made German resistance hopeless. Strategic air warfare in conformity with the law, the author holds, is at the same time best suited to military results.

Now in the age of the weapons of mass destruction, gas, nuclear and thermonuclear bombs, and guided missiles with thermonuclear warheads, it is all the more urgent to revise and codify the law of strategic air warfare for the sake of humanity. To re-introduce strongly the spirit of humanity will, at the same time, correspond best to the requirements of military necessity.

JOSEF L. KUNZ

I Diritti e Gli Obblighi degli Stati. Vol. I: *L'Ambiente delle Attività degli Stati.* By Mario Giuliano. Padua: Cedam, 1956. pp. xxxi, 509. Index.

This is, under a theoretically highly objectionable title, a book on the international law of territorial sovereignty. The title is, of course, not the fault of the author, but of the directors of this extensive Italian treatise on international law, now being prepared. On the one hand, present-day international law is no longer restricted to sovereign states, and on the

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other hand, all of international law, as far as sovereign states are concerned, deals with their rights and duties. Moreover, it is the duties which come first.

Let us give, first, the skeleton of Professor Giuliano's thoughts with precision and clarity. Disavowing any analogy with private law, the author gives a much more radical picture than that in the article by Professor Schwarzenberger, recently published in this JOURNAL.¹ The rule of general international law concerning territorial sovereignty, according to the author, has only a negative content, namely, the right of every state to exclude penetration into and action within its territory by any foreign state: the corollary of this right is the corresponding duty of all other states. But the exercise of the manifold activities of a state within its territory is not a subjective right, not a competence given to the state by international law, but a mere liberty in fact. This normal and stable exercise of state activities by a state within its territory is not the content, but only the presupposition of the norms of general international law. While giving, first of all, an exposé of general international law, the author deals also with the most important rules of particular, treaty-created international law, which, of course, may change the norms of general international law.

The sovereignty of a state over its "original" territory is for international law only historical data. By what means a state has acquired sovereignty over its original territory is legally irrelevant. For the coming into existence of a new state is not a question of law. The problem enters international law only when it is a question of the expansion of territorial sovereignty beyond its original territory.

Rejecting the traditional theory about the different modes of acquisition and loss of territorial sovereignty as a false analogy from private law, the author teaches that there is only *one* norm of general international law concerning the expansion of territorial sovereignty beyond a state's original territory, the same whether it is a question of expansion into a territory which had been under the sovereignty of another state or into *terrae nullius*. The content of this norm is the same as with regard to original territory: the right to exclude penetration and action by other states. Also the presuppositions are the same: intention to annex and *de facto* exercise of state activities in a normal and stable way. Hence also in a cession by treaty, it is the intention to annex and the normal exercise of state activities which expand sovereignty, whereas the treaty gives to the state only a right so to act. Hence the consent of the losing state has its value as an index of such normal state activity and stability, but is not necessarily a legal prerequisite, even apart from the cases of *debellatio* and prescription.

There is further a second, different and autonomous norm of general international law concerning what the author calls the *radiation* of territorial sovereignty (space below the territory, territorial waters, airspace above them). For here the presuppositions are not intention to annex

¹ 57 A.J.I.L. 308 (1957).

and normal and stable exercise of state activities; the supposition is merely that the state in question has territorial sovereignty, *e.g.*, of the land adjacent to the sea. The author holds that, in the absence of a norm of general international law as to the breadth of territorial waters, each state has the right to determine this breadth unilaterally, but only "within reasonableness."

As to the law of the high seas, the author teaches that the so-called "freedom of the seas" is merely a factual situation and not a subjective right of states, is merely the consequence of the absence of any sovereignty on the high seas.

Around this skeleton of ideas all the detailed problems, such as conquest, cession, territorial supremacy as distinguished from territorial sovereignty, prescription, dereliction, principle of non-recognition, contiguity, zones of influence, contiguous zone, fishing, conservation zones, continental shelf, piracy, salvage, hydrogen bomb experiments on the high seas, sovereignty in the Arctic and Antarctic, law of ships and law of the flag, condominium and many more are treated in great detail.

The author purposes to present the problems exclusively on the basis of the material furnished by the practice of states, keeping himself deliberately aloof from any preconceived attitude or *a priori* thesis. Nevertheless, he starts from philosophical, theoretical, methodological and even political bases which, in this reviewer's judgment, must be strongly rejected, because they often prevent the author from reaching correct results. First, the author is a "realist" and it is hard to see how, on this basis, one can arrive at the very concept of law—a normative concept. Second, he is a theoretical Marxist and starts from the philosophical presupposition that law is nothing but the superstructure of the conditions (probably exclusively the economic conditions) of a given society at a given time. Third, he is politically pro-Communist and puts great emphasis on the practice of states "dedicated to socialism" (an ambiguous phrase). Whereas he correctly stresses in general that the evaluation of the practice of states must be entirely neutral and unprejudiced, and always constitutes a delicate and subtle inquiry, he seems to take the Communist slogans such as "peaceful co-existence" at their face value. What does this Italian professor think about the brutal Soviet suppression of the heroic people of Hungary? Fourth, although a Marxist and pro-Communist, he is, nevertheless, an Italian and starts from the fallacious basis of the dualistic doctrine which permeates all parts of the book.

Notwithstanding our unconditional rejection of the author's Marxism and pro-Communism, of the author's realism and dualism, this is a book which stands far above the average. With amazing completeness it makes use of the whole practice of states, of each and every pertinent decision of national and international courts, of all the treaties, and combines this approach with an exhaustive use of the whole literature in all the principal languages. It is a monument of assiduous investigation and research, carried on for many years, and testifies to the great talent and the penetrating analysis of the author.

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JOSEF L. KUNZ

Chilean Sovereignty in Antarctica. By Oscar Pinochet de la Barra. Santiago de Chile: Editorial del Pacífico, 1955. pp. 62. Index.

This English translation of a lecture, based on the author's well-known book on the topic,¹ sets forth briefly and clearly the grounds on which Chile claims a sector of the Antarctic Continent and islands between 53° and 90° west longitude, overlapping in part British and Argentine claims in what is sometimes known as the "American Antarctic."² The author traces the Spanish claim to all lands which might be discovered west of a line from pole to pole dividing Spanish from Portuguese dominions, under the Papal Bulls of 1493 and the 1494 Treaty of Tordesillas between Spain and Portugal. He argues that the consequent Spanish claims to all undiscovered lands off South America, including the Antarctic, passed to Chile upon Chilean independence; and that this "imperfect title enjoyed by Chile" to that part of Antarctica facing South America was "completely perfected" in 1906 through the Chilean grant of a fishing concession, the formation of the Magallanes Whaling Company, which started operations on Deception Island in the South Shetlands, and formal statements by the Chilean Foreign Minister to the Chilean Navy Department. He states that

This exercise of economic and legal activities in Antarctica was sufficient to establish Chile's right of priority over a territory that was not "nullius." (p. 39.)

The author then recounts briefly the Chilean decree of November 6, 1940, fixing boundaries of the claim, the establishment of Chilean Antarctic bases in 1947 and following years, and the ensuing disputes with Argentina and the United Kingdom. He concludes that Chile has sovereignty through the combination of the historic claim, contiguity and actual occupation.

WILLIAM W. BISHOP, JR.

Egypt, Israel and the Gulf of Aqaba in International Law. By L. M. Bloomfield, Q. C. Toronto: The Carswell Co., Ltd., 1957. pp. viii, 240. Index. \$5.00.

Ten years ago the Gulf of Aqaba and the Straits of Tiran drowns in obscurity amongst the least known waterways of the world. Since that time, a major new port, Elath, has been established at the head of the Gulf; Egyptian guns have blocked the waterway; a battle has been fought for the Straits; and a great diplomatic conflict has been waged over the area. It is to these dramatic events, and to their antecedents in history and in law, that Mr. Bloomfield's book is devoted.

The problems of the Gulf of Aqaba and of the Straits giving access to it cannot be considered in isolation from a number of other legal issues regarding the relationships of Egypt and Israel. The Armistice Agreement of 1949 required, in the view of Mr. Bloomfield, an end to all hostile acts by the belligerents, whether on land, on the sea, or along the narrow water-

¹ *La Antártica Chilena* (Santiago de Chile, 1948). •

² Cf. Robert D. Hayton, "The 'American' Antarctic," 50 A.J.I.L. 583 (1956).

ways of Suez and Tiran, for the armistice "in the classic sense" must yield to the dictates of the United Nations Charter. Since Egypt lacked belligerent rights, it was without legal authority to blockade the Straits. The vessels of Israel and of other nations had a right of innocent passage through those straits and the Gulf itself. After an extended analysis of the modern history of the Sinai Peninsula, Mr. Bloomfield concludes that Egypt has no sovereignty over the area, but only a right of administration. Egypt therefore lacks the rights of a territorial sovereign over the waters of the Gulf. He believes that free passage through the Straits and the Gulf has not yet been guaranteed. The best possible way to achieve this result, short of agreement between the four nations concerned, would be a United Nations trusteeship over the southern Sinai Peninsula, or at least over the Sharm el Sheikh area and the Islands of Tiran and Sanafir. The significance of Aqaba lies not only in its contribution to the economic viability of Israel but in its possibilities as an alternate route to Suez for the transport of oil from the Middle East. If the Gulf is kept open, "Europe will breathe with two lungs instead of one" (p. 79).

As this summary indicates, this book is essentially a brief on behalf of Israel¹ and not a balanced appraisal of the conflicting claims which have been made. The case which Mr. Bloomfield is able to make for a right of free passage through the Straits is a strong one. This is so, notwithstanding the paradox of a declaration by the United States representative in the General Assembly that the United States was prepared to exercise the right of free and innocent passage through the Straits of Tiran in accordance with the principles agreed by the International Law Commission,² when the Commission had expressly refused to deal at all with "straits forming part of the territorial sea of one or more States and constituting the sole means of access to a port of another State."³ Mr. Bloomfield has been faced with a somewhat more difficult problem in maintaining the thesis that sovereignty over the Sinai Peninsula rests in either Turkey or Great Britain. The niceties of a distinction between "sovereignty" and a right of "administration" must probably yield to the realities of undisputed Egyptian control of the area for several decades.

Mr. Bloomfield deserves to be congratulated for the *tour de force* of producing a heavily documented and thoughtful book on Aqaba, the Sinai Peninsula, and Tiran within a few months after events were at fever pitch. Matters as late as the test passage of April 7, 1957, are referred to in the text. Under the circumstances, he may be pardoned for the slips (*e.g.*, a "Lord Justice Fuller" of the United States Supreme Court, a francoparle

¹ Indeed, several pages (7 to 11) have been reproduced almost literally, but without acknowledgment, from a background paper prepared by the Ministry for Foreign Affairs of Israel.

² 36 Dept. of State Bulletin 432 (1957).

³ Report of the International Law Commission Covering the Work of Its Eighth Session, 23 April-4 July 1956, at 20 (U.N. Doc. A/3159 (1956); 51 A.J.I.L. 154 (1957)). The Aqaba problem was the reason for the unwillingness of the Commission to deal with the question. 1 Yearbook of the International Law Commission 202-203 (1956).

Grotius, and a *Digest of International Law* by Oppenheim) which would undoubtedly have been eliminated had the volume been prepared in the more leisurely ways of most books on international law.

R. R. BAXTER

Annuaire suisse de droit international. Vol. XII, 1955. Zürich: Editions Polygraphiques, 1956. pp. 304. Fr. 29.10.

This volume of the *Yearbook of the Swiss Society of International Law* consists of six papers, of which two are on public and four on private international law. The documentary part is similarly divided, and the first part consists of materials relating to international law and relations, a repertory of bilateral and multilateral instruments to which Switzerland is a party and which entered into force in 1954 and 1955, and a bibliography. In the second part there are unannotated Swiss judgments and a bibliography on private international law. A useful table of contents of the first eleven volumes of the *Yearbook* concludes the volume.

For international lawyers the item of chief and abiding interest is Max Huber's recollections (in German) entitled "Co-existence and Community," covering the six and one-half decades of his public life. Of these, Judge Huber spent one as a student and traveler on four continents, two as professor in Zurich, one and one-half as adviser and representative in foreign affairs of his government, one as member of the Permanent Court of International Justice and two as President of the International Committee of the Red Cross. Huber's interest in international law has always been more with the underlying social dynamics than its logical structure as a system of norms. His pioneering study of 1910 on the sociological foundations of international law and the society of nations became the starting point for the growth of the new discipline, "international relations." Huber continued work on a comprehensive synthesis, "the spirit of international law," and he turned over his notes for this book to his nephew, Professor Dietrich Schindler, whose sudden and lamented death rendered the completion of this major project impossible. In this book, Huber would probably have developed his central idea that the validity of law is a problem of depth psychology.

Huber defines "co-existence" as a historical phenomenon characterized by the simultaneous and co-ordinate existence of a multiplicity of sovereign states, which are not subordinated to a common organization that would guarantee peace among them. He recalls that the Russian note of 1898 regarding the need for a limitation of armament and institutions for peaceful settlement of disputes was received with scepticism, and surveying the lot which befell some of the states, large and small, since then, he quotes the Roman warning: *Quem Deus perdere vult, primum dementat*. Of great interest are Judge Huber's account of the origin of the optional clause in Article 36 of the Statute of the Permanent Court of International Justice, which he traces to a Swiss proposal at the Second Hague Peace Conference, and of the developments, in which he played a key rôle, leading to the decision that Switzerland should join the League of Nations.

The United Nations did not bring into being a community of nations. The veto power attests to the continuation of the old system of mere co-existence of sovereign states and the organization represents a system in which a peaceful albeit unstable equilibrium prevails. A true community, says Huber, is one in which the individual is recognized as a moral and responsible person, and in which he is motivated by love and altruism in relation to others. Such a community cannot be established without a reform of mankind, which in turn presupposes a reform of the individual. Although the future looks bleak, Huber admonishes us to have faith and hope derived from faith. These considerations clearly reveal Huber's deep interest in theology.

Professor George Perrin contributes to the volume a paper (in French) on "The Basis and Limits of the Law of Nations." He develops the theme that international law is based on international solidarity, which he calls "secondary" compared with primary solidarity prevailing within a nation. This secondary solidarity is not a fixed datum. It is the occasional (and temporary) result of a community of interests which is recognized as such by the states concerned. The "fragility" of the secondary international, and the "solidity" of the primary national, solidarity explain the nature and limits of international law. Experience shows that states do not always rely upon international law but, depending upon their interests, on force or simply on their capacity to perpetuate conflicts by refusing to settle them. Thus international law is limited in space as its rules are not observed by all states, and in substance as states fail to create precise rules in areas in which international competition is most dangerous. Natural law furnishes the standard with which to measure the adequacy of positive international law. When the precepts of natural law are disregarded within the nation, totalitarianism makes its appearance; similarly when these precepts are disregarded by states, international relations reach a high degree of tension.

Students of private international law will no doubt be interested in the scholarly studies in this field of which only the titles can be mentioned here: "Is there a need for a new statute in Swiss private international law?" by Adolf F. Schnitzer; "The judge as law-giver in private international law" by Frank Vischer; "L'action en recherche de paternité" by Jean-Francois Aubert; and "The forthcoming Second Hague Conference on a Uniform Law of Sale" by Max Gutzwiller.

In the documentary part relating to public international law there is a very interesting opinion and report of the Federal Council relating to the power station at Rheinau, in which the relations of municipal and international law are searchingly examined. The particular question under consideration arose in connection with the proposal for a referendum on the unilateral cancellation of a concession granted by Switzerland pursuant to an agreement with Baden-Wurtemberg. Professor Guggenheim in his comment stresses the superiority of international law over municipal law and urges that modern constitutional law should aim at establishing and maintaining harmony between the international and the domestic legal

order. Also of interest is a judgment of the Commercial Tribunal in Zurich refusing to assimilate a stateless resident of France to French nationals and to extend to the former the exemption from security for costs of which the latter are beneficiaries under the Hague Convention, even though in France such stateless persons are assimilated to French nationals in this respect. Finally, mention may be made of a Swiss note to the Department of State in connection with an anti-trust action instituted against importers of Swiss watches. The tenor of the charges and the list of defendants are deemed to attempt interference in Swiss domestic jurisdiction and to violate Swiss sovereignty.

The editors of the *Yearbook* are to be congratulated for having produced once again an interesting and stimulating volume which demonstrates deep concern with and respect for international law.

LEO GROSS

La Codification du Droit International Privé. By Comité Français de Droit International Privé. Paris: Librairie Dalloz, 1956. pp. 308. Index.

In France, work has been going on for some time on revision of the Civil Code. In connection with this work, the Commission in charge of preparation of the revision has produced a draft law of 146 articles on private international law, designed to codify the presently uncoded law of conflict of laws. Author of the first draft was the late J.-P. Niboyet, member of the Commission.

The French Committee on Private International Law, a group of French conflicts specialists, in two mammoth sessions on May 20 and May 21, 1955, went over the whole draft and gave it a critical reading. Professors Jacques Maury, Henri Batiffol, and Yves Loussouarn, and Judge Georges Holleaux of the Court of Cassation, were reporters. The volume under review, in addition to the text of the draft law, contains the reports, the discussion, and the resolutions which were adopted. The volume is of substantial interest to the American conflicts specialist. It shows the views currently prevailing in France on basic questions of the conflict of laws. This material comes at a time when the American Law Institute is working on revision of the Restatement volume covering Conflict of Laws.

Examination of the discussion shows that quite a number of "innovations" in the draft law due to the influence of Professor Niboyet were voted down, some unanimously, as, for example, the requirement of reciprocity for recognition of foreign judgments. The discussion and the votes will no doubt have their influence on the ultimate fate of the draft law.

On the basic question of codification the Committee was divided. Most of the practitioners were against codification. The resolution on Codification reads (at page 298):

One group in the Committee expressed the view that private international law is a part of the law in plain evolution and not showing signs of ripeness for codification in the immediate future, and for

which more experience will be needed to solve its problems with full knowledge of what is involved. Another group, to which, finally, a majority adhered, thought that codification makes it possible to provide security in legal relations, that, for many problems, there are solutions generally admitted, corresponding to actual needs on which agreement exists, that, therefore, it is useful to proceed with the planned codification. To the latter solution a majority of the Committee, finally, gave its approval.

On the extent to which conflicts law should be codified, the views were likewise divided:

Some members of the Committee proposed restriction of the codification to special matters, like marriage, filiation, property, succession, for which they thought codification was possible, and exclusion from codification of general provisions. They thought that general principles, like *renvoi* and characterization, were not sufficiently ripe to be included in codification, and that the task of dealing with them should be left to doctrine and to the courts. Other members expressed the contrary opinion, insisting on the paradoxical character of a distinction between "principles" and special provisions which are mere application of the former and on the—regrettable—reduction of international influence of a Code which would only contain limited provisions. A majority of the Committee thought that general codification, general provisions included, should take place.

KURT H. NADELMANN

Nazionalità della Nave e Legge della Bandiera. By Franco Florio. Milan: Dott. A. Giuffrè, 1957. pp. xi, 231. Index. L. 1,200.

This book is a study on the nationality of ships as a point of contact in conflict of laws. The investigation starts with the research into the concepts of "ship" and of "nationality." Not only in Italian law, but in all laws the juridical concept of "ship" has as its elements the carriage of goods or persons by water and the license to navigate. The heart of the whole book is the investigation of the juridical concept of nationality. For the author there are two completely different concepts of nationality. The first is nationality as the concept of the *lex fori*, as an administrative qualification, determined by the legal norms of the juridical order of the forum. The second is nationality as used in conflict of laws. Here nationality means only a plain fact, the "belonging to a foreign state." As a connecting factor nationality is a political concept, not a formal quality, attributed by foreign law. The "belonging to a foreign state" is an historical fact, consists in the effective connection with a foreign state and is different from the contents of the qualifications which the foreign law contains. Nationality, as a point of contact in conflict of laws, is not nationality in the strict sense, corresponding to the formal organization of foreign legal orders, but merely a "belonging in fact." The reference of conflicts norms goes to the foreign sovereignties and not directly to their legal orders.

Problems of ships without a flag, of ships with more than one flag, of ships which fly the flag of a federal state and of ships which change their

with the Assembly. The Commission shall be responsible for taking the necessary steps to examine any such request made by a Member State.

CHAPTER VIII

System of Ownership

ARTICLE 86

Special fissionable materials shall be the property of the Community.

The Community's proprietary right shall extend to all special fissionable materials produced or imported by a Member State, individual or firm and subject to the security measures laid down in Chapter VII.

ARTICLE 87

Member States, individuals or firms shall have the fullest right to the use and consumption of special fissionable materials of which they have become duly possessed, subject to the obligations imposed on them by the provisions of the present Treaty, particularly as regards security measures, the right of option enjoyed by the Agency and the protection of health.

ARTICLE 88

The Agency shall keep, on behalf of the Community, a special account, called "Financial Account of Special Fissionable Materials."

ARTICLE 89

1. The Financial Account of Special Fissionable Materials:

(a) shall credit the Community, and debit the beneficiary Member State, individual or firm, with the value of special fissionable materials left or put at the disposal of such State, individual or firm;

(b) shall debit the Community, and credit the contributory Member State, individual or firm, with the value of special fissionable materials produced or imported by such State, individual or firm and becoming the property of the Community. A similar entry shall be made in the account whenever a Member State, individual or firm delivers back to the Community special fissionable materials previously left or put at the disposal of such State, individual or firm.

2. Fluctuations of value affecting the quantities of special fissionable materials shall be so entered in the accounts that they cannot occasion any loss or gain to the Community. Any losses or gains shall accrue to the holders.

3. Balances resulting from the above transactions shall be payable immediately on request of the creditor.

4. For the purposes of the present Section, the Agency shall be regarded as a firm in respect of transactions effected on its own account.

ARTICLE 90

Should new circumstances so require, the provisions of the present Chapter concerning the Community's right of ownership may, on the motion of

a Member State or of the Commission, be modified by the Council, voting unanimously on a proposal by the Commission and after consulting the Assembly. The Commission must take the necessary steps to examine any request made by a Member State.

ARTICLE 91

The system of ownership applicable to all objects, materials and goods not belonging to the Community under the terms of the present Chapter shall be determined by the laws of each Member State.

CHAPTER IX

The Common Nuclear Market

ARTICLE 92

The provisions of the present Chapter shall apply to the goods and products listed in Annex IV * to the present Treaty.

These lists may be amended, at the request of the Commission or of a Member State, by the Council, voting on a proposal by the Commission.

ARTICLE 93

Within a year of the entry into force of the present Treaty the Member States shall abolish, as between themselves, all import and export customs duties or equivalent taxes and all quantitative restrictions on imports or exports, in respect of:

(a) products mentioned in Lists A¹ and A²;

(b) products mentioned in List B so far as they are subject to a common tariff when imported from outside the Community, provided they are covered by a certificate issued by the Commission to the effect that they are intended for nuclear purposes.

Nevertheless, non-European territories under the jurisdiction of a Member State may continue to levy import or export duties or equivalent taxes of a purely fiscal nature. There shall be no discrimination as between the State concerned and other Member States in respect either of the level or of the methods of application of such duties and taxes.

ARTICLE 94

The Member States shall establish a common customs tariff for products from outside the Community, as follows:

(a) the level of the common customs tariff applicable to products mentioned in List A¹ shall be that of the lowest tariff in force on January 1, 1957, in any Member State;

(b) the Commission shall take all necessary measures for the opening of negotiations between Member States with regard to the products mentioned in List A², within three months from the entry into force of the present Treaty. Should it prove impossible, in the case of certain of these

* Not printed here.

products, to reach agreement before the end of the first year following the entry into force of the present Treaty, the Council shall, on the proposal of the Commission and by the prescribed majority, fix the level of the duties of the common customs tariff to be applied;

(c) the common customs tariff on products mentioned in Lists A¹ and A² shall be applicable as from the end of the first year following the entry into force of the present Treaty.

ARTICLE 95

The Council, on the proposal of the Commission and by a unanimous vote, may decide upon an earlier application of the common customs tariff to products mentioned in List B, in cases where such earlier application would be likely to contribute towards atomic development within the Community.

ARTICLE 96

The Member States shall abolish all restrictions based on nationality, placed upon the free access by nationals of any of the Member States to skilled employment in the nuclear field, subject to such limitations as may be imposed by the basic requirements of public order, public safety and health.

After consulting the Assembly, the Council may, by the prescribed majority and on the proposal of the Commission, which shall previously have taken the views of the Economic and Social Committee, issue directives as to the methods of application of the present Article.

ARTICLE 97

No restrictions based on nationality may be applied to individuals, corporations, or public or private bodies coming within the jurisdiction of a Member State and desiring to participate in the construction of an atomic plant, whether for research or production, inside the Community.

ARTICLE 98

The Member States shall take all necessary measures to facilitate the conclusion of insurance contracts against atomic risks.

Within a period of two years from the entry into force of the present Treaty the Council shall, after consulting the Assembly, adopt by the prescribed majority and on the proposal of the Commission, which shall previously have requested the advice of the Economic and Social Committee, directives as to the methods of application of the present Article.

ARTICLE 99

The Committee may make any recommendations calculated to facilitate movements of capital designed to finance the types of production listed in Annex II to the present Treaty.

ARTICLE 100

Each Member State undertakes to authorise, in the currency of the Member State in which the creditor or the beneficiary resides, payments necessitated by the exchange of goods, services or capital, and also transfers of capital and of wages to the extent to which the movement of goods, services, capital and persons is freed as between Member States in virtue of the present Treaty.

CHAPTER XX

External Relations

ARTICLE 101

Within the limits of the powers conferred upon it, the Community may enter into agreements or conventions with an outside State, an international organisation or a national of an outside State.

Such agreements or conventions shall be negotiated by the Commission in accordance with directives given by the Council and shall be concluded by the Commission with the approval of the Council given by the prescribed majority vote.

Nevertheless, agreements or conventions the implementation of which does not require action by the Council and can be carried out within the limits of the appropriate budget, shall be negotiated and concluded by the Commission, provided always that the Council is kept informed.

ARTICLE 102

Agreements or conventions concluded with an outside State, an international organisation or a national of an outside State to which, in addition to the Community, one or more Member States are parties may come into force only after all Member States concerned have notified the Commission that such agreements or conventions have become applicable under the terms of their respective national laws.

ARTICLE 103

Member States shall notify the Commission of any agreements or conventions they propose to enter into with an outside State, an international organisation or a national of an outside State, so far as such agreements or conventions fall within the scope of the present Treaty.

Should any proposed agreement or convention contain clauses likely to impede the application of the present Treaty, the Commission shall forward its comments to the State concerned within one month from the date on which it received such notification.

The State in question may not conclude the proposed agreement or convention until it has overcome the objections of the Commission or complied with the pronouncement of the Court of Justice, which shall give an urgent decision at its request as to the compatibility of the proposed clauses with the provisions of the present Treaty. The State in question may bring its

petition before the Court of Justice at any time after it has received the comments of the Commission.

ARTICLE 104

No individual or firm concluding or renewing an agreement or convention with an outside State, an international organisation or a national of an outside State, after the entry into force of the present Treaty, may invoke such agreement or convention to avoid complying with the obligations imposed upon it by the present Treaty.

Each Member State shall take all such measures as it considers necessary to give the Commission, at the latter's request, full information regarding agreements or conventions concluded after the entry into force of the present Treaty, and falling within the scope of the latter, by any individuals or firms with an outside State, an international organisation or a national of an outside State. The only object for which the Commission may require this information shall be to verify that such agreements or conventions do not contain clauses likely to impede the application of the present Treaty.

At the request of the Commission, the Court of Justice shall pronounce on the compatibility of such agreements or conventions with the provisions of the present Treaty.

ARTICLE 105

The provisions of the present Treaty may not be invoked to avoid the execution of agreements or conventions concluded, before its entry into force, by a Member State, an individual or a firm with an outside State, an international organisation or a national of an outside State, if such agreements or conventions have been communicated to the Commission at latest within thirty days of the entry into force of the present Treaty.

Nevertheless, an agreement or convention concluded during the period between the signature and the entry into force of the present Treaty, by an individual or firm with an outside State, an international organisation or a national of an outside State may not be invoked in opposition to the present Treaty if, in the opinion of the Court of Justice adjudicating at the request of the Commission, one of the motives of either of the parties in concluding such agreement or convention was to circumvent the provisions of the present Treaty.

ARTICLE 106

Member States which, before the entry into force of the present Treaty, shall have concluded agreements with outside States for co-operation in the field of atomic energy shall, in conjunction with the Commission, enter into the necessary negotiations with the outside States in question in order, so far as possible, to ensure the assumption by the Community of the rights and obligations arising out of such agreements.

Any new agreement resulting from such negotiation shall require the consent of the Member State or States parties to the aforesaid agreements, and also the approval of the Council, voting by the prescribed majority.

PART III

ORGANS

CHAPTER I

Organs of the Community

SECTION I—THE ASSEMBLY

[For Arts. 107–113 see Arts. 137–143 of the Economic Community Treaty above.]

ARTICLE 114

If a motion of censure concerning the operations of the Commission is tabled in the Assembly, the latter may decide thereon, by an open vote, only after not less than three days have elapsed from the tabling of the motion.

If the motion of censure is adopted by a two-thirds majority of the votes cast, representing a majority of the members of the Assembly, the members of the Commission shall resign their office in a body. They shall continue to deal with current business until they shall have been replaced in accordance with the provisions of Article 127.

SECTION II—THE COUNCIL

ARTICLE 115

The Council shall carry out its functions and exercise its powers of decision under the conditions laid down in the present Treaty.

It shall take all measures within the powers conferred upon it to co-ordinate the actions of Member States and the Community.

[For Arts. 116–123 see Articles 146–152, 154 of the Economic Community Treaty.]

SECTION III—THE COMMISSION

ARTICLE 124

With a view to ensuring the development of atomic energy within the Community, the Commission shall

supervise the application of the provisions of the present Treaty and of measures adopted by the organs of the Community in virtue of the said Treaty;

put forward recommendations or opinions in regard to matters covered by the present Treaty, in cases where such recommendations or opinions are explicitly provided for in the said Treaty or where the Commission considers them to be necessary;

enjoy independent powers of decision and share in the preparation of Council and Assembly documents, under the conditions laid down in the present Treaty;

exercise the powers conferred on it by the Council with a view to the execution of the regulations laid down by the latter.

[For Art. 125 see Article 156 of the Economic Community Treaty.]

ARTICLE 126

1. The Commission shall be composed of five members, of different nationalities, selected for their general competence in regard to the special purposes of the present Treaty and of unquestioned impartiality.

The number of members of the Commission may be altered by a unanimous vote of the Council.

Members of the Commission must be nationals of Member States.

[Remaining provisions of Article 126 are the same as those in Article 157 of the Economic Community Treaty, with the exception of reference to Article 129 of the present Treaty instead of Article 160 of the Economic Community Treaty.]

[For Art. 127 see Article 158 *ibid.*]

[Article 128 same as Article 159, *ibid.*, except for reference to Article 129 of present Treaty instead of Article 160 *ibid.*]

[For Art. 129 see Article 160 of the Economic Community Treaty.]

ARTICLE 130

The Chairman and the Vice-Chairman of the Commission shall be appointed from among members of the latter, for two years, following the same procedure as that laid down for the appointment of members of the Commission. They shall be re-eligible.

Except in the case of a complete change of membership, the appointment shall be made after consultation with the Commission.

In case of the resignation or death of the Chairman or Vice-Chairman, he shall be replaced for the remainder of his term of office, according to the procedure laid down in the first paragraph of the present Article.

[For Art. 131 see Article 162 of the Economic Community Treaty.]

ARTICLE 132

Decisions of the Commission shall be taken by a majority of the number of members provided for in Article 126.

No session of the Commission shall be valid in the absence of the quorum laid down in its Rules of Procedure.

ARTICLE 133

The Council may, by a unanimous vote, agree to the appointment, by the Government of a Member State, of an accredited representative to be responsible for ensuring permanent liaison with the Commission.

ARTICLE 134

1. There shall be set up, attached to the Commission, a Scientific and Technical Committee, with consultative status.

The Committee must be consulted in all cases laid down in the present Treaty and may be consulted in other cases, should the Commission consider it desirable.

2. The Committee shall be composed of twenty members appointed by the Council after consultation with the Commission.

Members of the Committee shall be appointed in their personal capacity for a term of five years and shall be eligible for reappointment. They may not be bound by any overriding mandate.

The Scientific and Technical Committee shall each year elect its Chairman and officers from among its own members.

ARTICLE 135

The Commission may hold any consultations and set up any study committees necessary to the discharge of its mission.

SECTION IV—THE COURT OF JUSTICE

[For Art. 136 see Article 164 of the Economic Community Treaty.]

[Article 137 same as Article 165 *ibid.*, with substitution of references in 3rd paragraph to Article 150 of present Treaty, and in 4th paragraph to Article 139 of present Treaty.]

[Article 138 same as Article 166 *ibid.*, with substitution of references in 2nd paragraph to Article 136 of present Treaty, and in 3rd paragraph to Article 139 of present Treaty.]

[For Arts. 139–143, see Articles 167–171 of the Economic Community Treaty.]

ARTICLE 144

The Court of Justice shall have powers of full jurisdiction in respect of:

(a) Appeals brought under Article 12, with a view to the determination of suitable conditions for the granting of licences or sub-licences by the Commission;

(b) Appeals brought by individuals or firms against penalties imposed on them by the Commission under Article 83.

ARTICLE 145

If the Commission considers that an individual or firm has committed a violation of the present Treaty in respect of which the provisions of Article 83 are not applicable, it shall invite the Member State to which such individual or firm belongs to impose penalties in respect of such violations under its national laws.

If the Member State concerned does not comply with this invitation within the period laid down by the Commission, the latter may submit the case to the Court of Justice with a view to establishing that such violation has been committed by the individual or firm in question.

[For Arts. 146-148 see Articles 173-175 of the Economic Community Treaty.]

[Article 149 the same as Article 176 *ibid.*, with substitution of reference in 2nd paragraph to Article 188 of the present treaty.]

[For Art. 150 see Article 177 of the Economic Community Treaty.]

ARTICLE 151

The Court of Justice shall be competent to hear cases relating to compensation for damage as provided for in the second paragraph of Article 188.

[For Arts. 152-155 see Articles 179, 181-183 *ibid.*]

[Article 156 the same as Article 184 *ibid.*, with substitution of reference to Article 146 of present Treaty.]

ARTICLE 157

Except where otherwise provided in the present Treaty, appeals lodged with the Court of Justice shall not have any staying effect. Nevertheless, if it considers that circumstances so require, the Court of Justice may order the suspension of the execution of the decision in issue.

ARTICLE 158

In any cases submitted to it, the Court of Justice may order such temporary measures as it may consider necessary.

ARTICLE 159

The judgments of the Court of Justice shall have executory force under the conditions laid down in Article 164.

[For Art. 160 see Article 188 of the Economic Community Treaty.]

CHAPTER II

Provisions Common to Several Institutions

[For Arts. 161-163 see Articles 189-191 of the Economic Community Treaty.]

[Article 164 the same as Article 192 *ibid.*, with omission of first paragraph of the latter.]

CHAPTER III

The Economic and Social Committee

ARTICLE 165

An Economic and Social Committee shall be set up with advisory functions.

The Committee shall consist of representatives of the different branches of economic and social life.

[For Arts. 166-168 see Articles 194-196 of the Economic Community Treaty.]

ARTICLE 169

The Committee may be subdivided into specialised sections. These sections shall operate within the framework of the general powers conferred upon the Committee. The specialised sections may not be consulted independently of the Committee.

There may also be set up within the Committee sub-committees for the purpose of drawing up draft opinions on specific matters or in specific fields for submission to the Committee.

The rules of procedure shall determine the methods of appointing specialised sections and sub-committees and the competence conferred upon them.

[For Art. 170 see Article 198 of the Economic Community Treaty.]

PART IV. FINANCIAL PROVISIONS

ARTICLE 171

1. Estimates must be drawn up for each financial year for all receipts and expenditures of the Community, apart from those of the Agency and Joint Enterprises, and must appear either in the operational budget or in the research and investment budget.

The receipts and expenditures of each budget must be balanced.

2. Estimates of the receipts and expenditures of the Agency, which will operate in accordance with commercial rules, shall appear in a separate statement.

The conditions governing the estimation, implemetation and verification of these receipts and expenditures shall be determined, with due regard for the statutes of the Agency, by the financial regulations provided for in Article 183.

3. The estimates of receipts and expenditures, together with the trading accounts and balance-sheets of Joint Enterprises for each financial year, shall be communicated to the Commission, the Council and the Assembly, as laid down in the statutes of those Enterprises.

ARTICLE 172

1. The receipts of the operational budget, apart from current revenue from other sources, shall comprise the financial contributions of Member States, fixed on the following proportionate scale:

Belgium	7.9
France	28
Germany	28
Italy	28
Luxembourg	0.2
Netherlands	7.9

2. The receipts of the research and investment budget, apart from any funds which may be received from other sources, shall comprise the financial contributions of Member States, fixed on the following proportionate scale:

Belgium	9.9
France	30
Germany	30
Italy	23
Luxembourg	0.2
Netherlands	6.9

3. The proportionate scales may be changed by a unanimous decision of the Council.

4. Loans for the financing of research or investment shall be contracted on terms settled by the Council voting as prescribed in Article 177, paragraph 5.

The Community may raise loans on the capital market of a Member State under the legal regulations applying to domestic loans or, in a Member State where such regulations do not exist, if the Member State and the Commission after mutual consultation agree upon the loan envisaged by the Commission.

The consent of the competent authorities in the Member State may not be refused unless serious disturbances in its capital market are to be feared.

ARTICLE 173

The financial contributions of Member States under Article 172 may be replaced, wholly or partly, by the yield of taxes collected by the Community in Member States.

To this end, the Commission shall submit to the Council proposals concerning the assessment of the tax, the method of fixing the rate, and the procedure for collection.

The Council may by a unanimous decision, taken after consulting the Assembly on the above proposals, draw up provisions which it would recommend Member States to adopt in accordance with their respective constitutional regulations.

ARTICLE 174

1. The expenditure appearing in the operational budget shall comprise:
 - (a) administrative expenses; and
 - (b) expenses connected with security control and health protection.
2. The expenditure appearing in the research and investment budget shall comprise:
 - (a) expenditure incurred in the implementation of the Community's research programme;
 - (b) any participation in the capital of the Agency and its investment expenditure;

- (c) expenditure involved in the equipment of teaching establishments;
and
- (d) any participation in Joint Enterprises and certain joint operations.

ARTICLE 175

The expenditure entered in the operational budget shall be authorised for the duration of one financial year, unless any provisions to the contrary are contained in the regulations adopted under Article 183.

Subject to the conditions to be laid down in application of Article 183, any funds, other than those earmarked for staff costs, which are unexpended at the end of the financial year may be carried over, but not beyond the end of the following financial year.

Appropriations for running expenses shall be set out under different heads, according to type or purpose and subdivided, as far as necessary, in accordance with the regulations adopted under Article 183.

There shall be separate sections of the budget for expenditure in connection with the Assembly, the Council, the Commission and the Court of Justice, apart from the entry of certain joint expenses under a special head.

ARTICLE 176

1. Appropriations for research and investment, within the limits set by the agreed programmes or by decisions on expenditure, which under the present Treaty require the Council's unanimity, shall comprise:

- (a) budget appropriations for a special sector forming a separate unit and a coherent whole;
- (b) budget authorisations representing the maximum sum payable each year for covering commitments contracted under paragraph (a).

2. The bill-book of appropriations and authorisations shall be annexed to the corresponding draft budget proposed by the Commission.

3. Appropriations for research and investment shall be set out under different heads according to type or purpose of the expenditure and subdivided, as far as necessary, in accordance with the regulations adopted under Article 183.

4. Unexpended budget authorisations shall be carried over to the following financial year by a decision of the Commission, unless the Council decides otherwise.

ARTICLE 177

1. The financial year shall run from 1 January to 31 December inclusive.

2. Each of the institutions of the Community shall draw up provisional estimates of its administrative expenses. The Commission shall combine these estimates in a preliminary draft operational budget; to this it will attach its comments, which may include divergent estimates. It shall also draw up the preliminary draft of the research and investment budget.

Preliminary draft budgets must be laid before the Council by the Commission not later than 30 September of the year preceding the implementation of the budget.

The Council shall consult the Commission and, when appropriate, other institutions concerned, if it intends to depart from the preliminary drafts submitted.

3. The Council, voting with the prescribed majority, shall establish the draft budgets and shall then forward them to the Assembly.

The Assembly must have the draft budgets laid before it not later than 31 October of the year preceding their implementation.

The Assembly shall be entitled to propose to the Council changes in the draft budgets.

4. If, one month after receiving the draft budgets, the Assembly has either stated its approval or has failed to forward its comments to the Council, the draft budgets shall be considered as finally adopted.

If, within this period, the Assembly has proposed certain changes, the draft budgets, thus amended, shall be forwarded to the Council. The Council shall then discuss them with the Commission and, when appropriate, with the other institutions concerned, and shall finally approve the budgets by the prescribed majority vote, within the limits set by agreed programmes or by decisions on expenditure, which under the present Treaty require the Council's unanimity.

5. For the approval of the research and investment budget the votes of Members of the Council shall be weighted as follows:

Belgium	9
France	30
Germany	30
Italy	23
Luxembourg	1
Netherlands	7

Decisions shall be valid if supported by at least 67 votes.

ARTICLE 178

If, at the beginning of the financial year, the operational budget has not yet been approved, expenditure may be made on a monthly basis per section or other division, according to the provisions of the regulations adopted under Article 183, up to one-twelfth of the budget appropriations for the preceding financial year; but the amount thus made available to the Commission shall not exceed one-twelfth of the total appropriations shown in the draft of the budget in course of preparation.

If, at the beginning of the financial year, the research and investment budget has not yet been approved, expenditure may be made on a monthly basis per section or other division, according to the provisions of the regulations adopted under Article 183, up to one-twelfth of the appropriations corresponding to the annual estimates entered in the bill-book for budget authorisations previously approved.

The Council may, by decision of a prescribed majority and subject to the other conditions stipulated in paragraphs 1 and 2, authorise expenditure over and above one-twelfth, within the limits set by the agreed programmes

or by decisions on expenditure, which under the present Treaty require the Council's unanimity.

Member States shall pay every month, on a provisional basis and in accordance with the proportional scale adopted for the previous financial year, the amounts necessary to ensure implementation of the present Article.

[Articles 179 and 180 are the same as Articles 205 and 206 of the Economic Community Treaty, except that the former deal with budgets in the plural, and Article 179 refers to Article 183 of the present Treaty.]

ARTICLE 181

The budgets and statement mentioned in paragraphs 1 and 2 of Article 171 shall be drawn up in the accounting units fixed in accordance with the provisions of the financial regulations adopted under Article 183.

The financial contributions mentioned in Article 172 shall be made available to the Community by Member States in their own currency.

The available balances of these contributions shall be deposited with the Treasuries of Member States or with organizations designated by them. The value of funds, whilst on deposit, shall remain at the parity rate in force at the time of deposit in relation to the accounting unit mentioned in paragraph 1.

These funds may be invested under conditions to be decided by agreements concluded between the Commission and the Member State concerned.

ARTICLE 182

1. The Commission may, provided it notifies the competent authorities of the Member States concerned, transfer its holdings in the currency of any one Member State into the currency of another Member State, if this is necessary in order to enable such funds to be used for the purposes for which they are intended by the present Treaty. The Commission shall, however, refrain as far as possible from making such transfers if it possesses liquid or realisable funds in the currencies it needs.

2. The Commission shall communicate with each Member State through the authority designated by the State. For financial operations, it shall use the services of the bank of issue of the Member State concerned, or of some other financial institution approved by that State.

3. As regards expenditure to be made by the Community in currencies of countries outside the Community, the Commission shall submit to the Council, before the budgets are finally approved, a programme showing the receipts and expenditures to be effected in the different currencies.

This programme shall be approved by a prescribed majority decision of the Council. It may be amended in the course of the financial year by the same procedure.

4. Funds in currencies of countries outside the Community, when required in order to meet items of expenditure appearing in the programme mentioned in paragraph 3, shall be handed over to the Commission by Mem-

ber States according to the proportionate scales laid down in Article 172. The same scales shall be applied for the allocation to Member States of currencies of outside countries collected by the Commission.

5. The Commission may dispose freely of funds in the currencies of countries outside the Community obtained by loans raised in those countries.

6. The exchange arrangements set out in the foregoing paragraphs may be made wholly or partly applicable to the Agency and to Joint Enterprises and may, if necessary, be adapted to their operational needs by unanimous decision of the Council, taken on a proposal by the Commission.

[For Art. 183 see Article 209 of the Economic Community Treaty.]

PART V. GENERAL PROVISIONS

[For Arts. 184–191 see Articles 210–213, 215–218 of the Economic Community Treaty.]

ARTICLE 192

Member States shall take all general or special measures necessary to secure execution of the obligations arising out of the present Treaty or resulting from instruments enacted by the Community's institutions. They shall help the Community in the fulfilment of its mission.

They shall abstain from any measures likely to jeopardise achievement of the aims of the present Treaty.

[For Art. 193 see Article 219 of the Economic Community Treaty.]

ARTICLE 194

1. The members of the Community's institutions, members of committees, officials and agents of the Community, and any other persons whose functions or whose public or private relations with the institutions or organs of the Community or with Joint Enterprises, make it necessary for them to take or receive communication of facts, information, knowledge, documents or matters kept secret under provisions adopted by a Member State or by an institution of the Community, shall be required, even after termination of those functions or relations, to keep them secret from any unauthorised person and from the public.

Each Member State shall regard any breach of this obligation as a violation of its protected secrets, falling, as regard both substance and jurisdiction, under the provisions of its own laws applying to attacks on the security of the State or to the divulging of professional secrets. It shall proceed against every person guilty of such a violation within its jurisdiction at the request of any Member State concerned or of the Commission.

2. Each Member State shall communicate to the Commission all provisions regulating in its territories the classification and secrecy of information, knowledge, documents or matters relating to the field of application of the present Treaty.

The Commission shall ensure that these provisions are made known to the other Member States.

Each Member State shall take all appropriate steps to facilitate the gradual establishment of the fullest and most uniform possible system of protection for official secrets. The Commission may issue any recommendations to this end after consulting with the Member States concerned.

3. The institutions of the Community and their organs, and also Joint Enterprises, must apply the provisions regarding the protection of official secrets which are in force in the territory in which each of them is situated.

4. Any authorisation to receive communication of facts, information, documents or matters relating to the field of application of the present Treaty and classified as official secrets, granted either by an institution of the Community or by a Member State to a person operating within the field of application of the present Treaty shall be recognised by every other institution and every other Member State.

5. The provisions of the present article shall not prevent the application of special provisions resulting from agreements concluded between a Member State and an outside State or an international organisation.

ARTICLE 195

The institutions of the Community, the Agency and Joint Enterprises must, in the application of the present Treaty, respect conditions imposed with regard to access to mineral ores, raw materials, and special fissionable materials, by national regulations enacted for reasons of public order or public health.

ARTICLE 196

For the purposes of the present Treaty and in the absence of conflicting provisions therein:

(a) the term "individual" shall denote any physical person all or some of whose activities in the territories of Member States come within the sphere defined in the corresponding section of the Treaty;

(b) the term "firm" shall denote any enterprise or body all or some of whose activities are exercised under the same conditions, whatever may be its public or private legal status.

ARTICLE 197

For the purposes of the present Treaty:

1. The term "special fissionable materials" shall denote plutonium 239, uranium 233, uranium enriched with uranium 235 or 233; any product containing one or more of the above isotopes and such other fissionable materials as shall be defined by the Council, voting by the prescribed majority on a proposal of the Commission; the term "special fissionable materials" shall not, however, apply to raw materials.

2. The term "uranium enriched with uranium 235 or 233" shall denote uranium containing either uranium 235 or uranium 233, or both these isotopes, in such quantity that the ratio between the sum of these two isotopes

flag are studied. As you can expect of an Italian author, the study makes a painstaking use of the whole literature of all languages, of all the documents, and shows the usual subtle theoretical reasoning. But, as must also be expected in an Italian author, it starts from the fallacious basis of the "strictest dualist doctrine," accepted even in the often absurd form given to it recently by Arangio Ruiz. The author is mistaken when he believes and continuously states that the dualistic doctrine is the dominant one; quite to the contrary, it is today generally abandoned and has one of its few remaining oases only in the Italian School.

This concept of nationality as a mere belonging in fact is, according to the author, not only used by conflict of laws, but also by international law. In the corresponding pages (pp. 137-151) the full untenability of the dualistic doctrine reveals itself glaringly. According to the author, international law regulates exclusively relations between sovereign entities, but not the forms of acquisition, modification or loss of sovereignty itself. International law takes sovereign states, their jurisdiction, their capacity only as pre-existing data. Sovereign states are original, their legal orders are original; their jurisdiction is merely an historical sociological fact, and by no means a competence given to them by international law. That is why for the author American interstate conflict of laws is something totally different from American international conflict of laws—that is why a non-sovereign entity, even if it is a subject of international law, can have no "original" legal order. Hence a reference in a norm of conflicts of laws of the *lex fori*, in the case of ships flying the flag of the United Nations, can only mean a reference of belonging in fact to the sovereign state which has admitted this ship to navigation through registration. For the so-called "internal law" of the United Nations is for the author neither international law, nor can it be an "original" legal order. Let us mention here that long ago the European Danube Commission which, by treaty, was wholly independent of the legal order of the state of its seat, had its own ships on the Danube which flew the flag of the Commission.

All that shows convincingly that the dualistic construction, apart from being untenable philosophically and theoretically, is wholly unable to present systematically the international law actually in force.

JOSEF L. KUNZ

Swords into Plowshares. The Problems and Progress of International Organization. By Inis L. Claude, Jr. New York: Random House, 1956. pp. xii, 498. Appendices. Index. \$9.00.

We have here a very intelligent and sympathetic appreciation of the problems of international organization, subdivided into various chapters dealing with different aspects of the League of Nations and the United Nations, and a number of substantive problems, such as voting, administration, collective security, and so on.

The heart of the author is obviously committed to the cause of international organization—as the title of the volume would imply. This leads

inevitably to a certain bias in dealing with particular topics. On the other hand, the author exercises a good deal of discretion at other points—see the treatment of majority rule in Chapter 7. On the whole the balance swings definitely on the side of scientific objectivity.

The main criticism which this reviewer would express in relation to this work refers to the neglect of the vast volume of international organization outside of the United Nations. There are dozens and scores of international institutions outside of that organization and the Organization of American States, not to mention the whole network of diplomacy, treaty-making, independent conferences and tribunals and so on. The problems of international organization are not confined to the United Nations, to which at least one half of this volume is devoted. The United Nations will come to an end sooner or later. But the problem of international organization will go on forever.

PITMAN B. POTTER

The United Nations. Ten Years' Legal Progress. By Hans Kelsen and others. The Hague: Nederlandse Studentenvereniging voor Wereldrechtsoorde, 1956. pp. viii, 192.

This small but substantial volume, published by the Dutch United Nations Students Association, contains, under a somewhat misleading title, a collection of essays written on the occasion of the tenth anniversary of the United Nations. The international symposium includes: "General International Law and the Law of the United Nations" by H. Kelsen, U. S. A.; "Sovereignty and the United Nations (Domestic Jurisdiction)" by U. Scheuner, Germany; "The Development and Codification of International Law" by R. Cordova, Mexico; "The United Nations and the Development of International Criminal Law" by B. V. A. Röling, Netherlands; "Function of the International Court of Justice in the Framework of the International Legal Order" by E. Hambro, Norway; "The United Nations and the Underdeveloped Areas" by W. F. de Gaay Fortman, Netherlands; "La Question des Aborigènes aux Nations Unies" by F. van Langenhove, Belgium; "Statut Juridique des Fonctionnaires des Nations Unies" by Suzanne Bastid, France; "Revision of the Charter" by J. Robinson, Israel. Limitations of space permit only the following comments:

In his essay Professor Kelsen deals with the relationship between general international law and the law of the United Nations established by the Charter to which almost all, but not all, the states of the world are parties. He illustrates the problem by comparing the collective security system of the two legal orders and discusses in this connection Article 2, par. 6, of the Charter to which almost all, but not all, the states of the world are parties. member states act in accordance with the Principles of the Charter "so far as may be necessary for the maintenance of international peace and security." He points out that the Charter is, in this respect, a treaty *à la charge d'Etats tiers* and that, in view of the "exceptions to the principle restricting the binding force of a treaty to the contracting parties," it

may be considered to be in conformity with general international law. Or, as Kelsen himself put it in his *The Law of the United Nations* (p. 109):

In Article 2, paragraph 6, the Charter shows the tendency to be the law not only of the United Nations but also of the whole international community, that is to say, to be general, not only particular, international law.

This opens wide perspectives and suggests again the importance of an exhaustive study of the problem of autonomy and heteronomy in international law which remains yet to be written.

The first Registrar of the International Court of Justice rightly starts his interesting essay on the function of the Court with a reference to Article 38 of the Statute, which declares this function to be "to decide in accordance with international law such disputes as are submitted to it." Dr. Hambro rightly emphasizes the importance of the quasi-judicial advisory opinions of the Court and of the case law it builds up through its judgments and opinions (this despite Article 59 of the Statute). On the other hand, he seems to overstress the law-creating rôle of the Court, although he realizes the danger which such law-creation and development by the Court implies, as far as the recognition and extension by states of the Court's jurisdiction are concerned.

The timely and not so timely problem of Charter revision (as the recent postponement of a consideration of the question in the United Nations for another two years shows) is ably dealt with by Dr. Robinson. He sketches the rôle of the United Nations in world politics and the metamorphosis which the organization and its Charter have undergone, outlines the review of the Charter in and outside the United Nations and discusses problems arising in connection with the convocation of a revision conference. As this reviewer has tried to show elsewhere, there is this paradox: The greater the disagreement between United Nations Members, the greater the need for Charter revision and the smaller its likelihood, and *vice versa*. Fundamentally, revision is either unlikely or unnecessary.

SALO ENGEL

A Short History of the Far East. 3rd ed. By Kenneth Scott Latourette. New York: Macmillan Co., 1957. pp. xiv, 754. Index.

Professor Latourette first studied "Far East" at Yale and later long taught "Far East" at that university. He first went to the Far East, to China, two years before the fall of the Manchus. He was there when in 1911 the Republic of China was born. In the year in which World War I began he entered upon the career in which he has achieved distinction first as a pioneer and ultimately as a patriarch among American scholars concerned, whether as teachers or as writers or as both, with either or with both of two subjects, knowledge of the Far East and knowledge of Christian Missions.

After forty years of getting and giving, at home and abroad, in those fields, and with long experience in the classroom, in the pulpit, on lecture

platforms and as the author of many books, he produced in 1946 "A Short History of the Far East." Of this book he himself said: "The purpose . . . is to provide an introduction to the contemporary Far East." He had in mind both "general readers" and "teachers and students who desire a text book," and he wrote "primarily" for Americans. He believed that "the American public will best be served by as objective and dispassionate a treatment as the author can achieve" and, further, that "the present can be understood only through a knowledge of the past." In 1951 came a second edition, and now, in 1957, a third.

In this book Professor Latourette has dealt largely with history and politics; has featured not only China and Japan, the principal Asian countries in the Far East, but also India, which competes with those two in the larger region, Eastern Asia; and has given attention to "the lesser lands" collectively and individually; but he has dealt only incidentally and *passim*, though extensively, with the Czarist and Soviet operations in the Far East rather than expressly with the now important product of those operations, the Russian Far East. (The Soviet Union, by virtue of its possession and development of the huge area between Lake Baikal and the Pacific, has itself become a Far Eastern—as well as European—Power and thus is a fourth among the leading contenders in Eastern Asia for place and influence in that vast region.)

For the purposes of a "short history" and an "introduction" the author has done well by the lands and the developments which have been and are of most importance toward giving Americans a working perspective in regard to the Far East. Among other things—understanding as he does the part which has been played by Christianity in the evolution of Western culture, in the history of the Western expansion, and in the thinking and the way of living which prevail in the United States—he has not failed to give attention to the rôle of Christian missionaries and the place, historical and actual, of the movement which they represent, in relations between the West and the lands and peoples of the Far East. Very useful "as is," the book would have even greater value, as this reviewer sees it, but for Professor Latourette's conscientious commitment and adherence to the principle of "dispassionate treatment."

In this third edition the text has been revised to the extent of attention having been given to territorial changes and to refurbishing of the bibliographies and, most importantly, a chapter having been added "to bring the narrative down to date." More attention might to advantage have been given to internal revision of some passages and down-to-dating of some of the chapters individually. It is regrettable that of its half-dozen simply and clearly-drawn maps two at least have been left sadly out of date.

Among adjectival features of special merit are the author's reliance on his own text without an underpinning of footnotes and of sets of questions or topics for the feather-bedding of teachers and students; the brevity and selectivity displayed in the composition of the bibliographies; and the presence of a comprehensively adequate index.

STANLEY K. HORNBECK

United States-Persian Diplomatic Relations 1883-1921. By Abraham Yeselson. New Brunswick: Rutgers University Press, 1956. pp. xii, 252. Index.

This well-documented book deals with the United States' diplomatic relations with Iran and will be of value to the serious student as well as the general reader. It is a competent book in the style of a doctoral thesis.

Obviously the author's aim has been a limited one, namely, the appraisal of the American aspect of United States relations with Iran during the period under consideration. The author has extensively examined the State Department files and has drawn heavily from consular letters, notes, despatches, and instructions. Somewhat undue emphasis upon the presentation of the contents of these documents and their essential substance is made at the expense of the study and evaluation of the problem. In fact, the work is basically a mosaic of phrases and quotations from the wealth of diplomatic correspondence which are presented in a systematic fashion together with explanations to make the work clear and more meaningful. Analytical consideration is thinly scattered here and there. Little attempt is made to integrate the pattern of the Iranian position and the pattern of British and Russian movements with American diplomacy in order to examine the difficult and much neglected political and psychological warfare aspect of the subject.

The author's treatment leaves something further to be desired. The period under study is an important link in the chain of events that followed up to recent years. British influence began to decline during this period and the slow but inevitable course of American intervention in Iran increased. Therefore, a more concrete evaluation of the nature of the position of the United States in Iranian affairs and the implications thereof seems essential to the study.

In the examination of United States-Persian diplomatic relations the author has made no use of the Persian material. Only excerpts of the Iranian documents which were contained in the American sources are presented. The author has actually presented the American side of the relations with Iran and it is quite possible that some readers may get an incomplete impression in some instances. Moreover, there are traces of somewhat hasty judgment against Persians which may distract the serious student, and indeed the vindictory tone of it is strong with no effort to examine the Persian views. This is no place to express judgment concerning the author's handling of particular views and the above comment is distinctly a one-word reminder.

Finally, among the books listed by the author there are some which are of little significance, while a number of serious and valuable sources are omitted.

Despite these shortcomings the author has pursued the subject matter diligently, with competence and accuracy. The material is well integrated as a whole, and the book constitutes interesting reading.

CYRUS H. KHABIRI

Sterling Dollar Diplomacy. Anglo-American Collaboration in the Reconstruction of Multilateral Trade. By Richard N. Gardner. Oxford: Clarendon Press, 1956. pp. xxii, 423. Index. \$6.75; 30 s.

As Mr. R. F. Harrod writes in his "Foreword," this is a stimulating book on an important subject. As it is only marginally concerned with international law, a short notice may suffice for these pages; nor does this reviewer enjoy the double qualification of the author as an economist and a lawyer.

It is, however, obvious that the most vital developments in international law in the postwar world have occurred in the sphere of international economic relations, and that the international lawyer cannot hope to understand such issues as the General Agreement on Tariff and Trade or the function of such institutions as the International Monetary Fund or the World Bank, without a study of the economic background. The main value of the book does not, however, lie in the skillful tracing of the economic issues, but in its study of "the making of international economic policy and the shaping of institutions to implement that policy. It places special emphasis on the interaction between official policy and public opinion—particularly, on the difficult problem of explaining complex economic policies to a democratic electorate. . . . Perhaps it can best be described as 'a study in international economic diplomacy.' " *

The approach is a combination of the historical and the functional. The main issue of the book is the problem of multilateralism in the economic relations between Britain and the United States. At the same time, the story unfolds historically, from the war years to perhaps the severest crisis in the economic relations between the two countries in 1947. There the story unfortunately ends, although we may hope that Mr. Gardner will, at some time, take it up further.

This is not the only instance in which the remarkable and perhaps unique experiment in close integrated economic collaboration between the two countries during the supreme emergency was followed by a sudden, tragic, relaxation and even antagonism in the postwar world. Most of this, as Mr. Gardner points out, was due to misunderstandings on both sides, not only by ill-informed public opinion, but also by many of the politicians and statesmen immediately involved. For a few critical years, the United States believed in a return to normalcy, to ordinary commercial dealings with a country that had, at the end of the second World War, nearly exhausted the economic reserves accumulated during centuries, and spent in two World Wars. The British felt that they had contributed more in the way of personal and economic sacrifices than the United States (which, particularly in the economic field, can hardly be denied). The Americans felt, as so often, that Britain was tending to use Uncle Sam's naïve goodheartedness. The tragic climax of these misunderstandings was the brief period of free convertibility of sterling, based on the Financial Agreement, followed by the severe economic crisis in Britain of 1947.

* From the author's Preface.

The greatest positive achievement of that whole period did not result from any direct Anglo-American negotiations, but from the Marshall Plan, from which Britain derived substantial benefits, but which was essentially aimed at the reconstruction of Western Europe. It remains nonetheless a shining landmark in the history of postwar economic diplomacy. For here the United States clearly understood the part which it had to play as the world's leading producer and creditor, and as political and military leader of the Western world. Perhaps American policy was able to be less self-conscious in problems affecting Europe as a whole than in those affecting its relations with Great Britain, still often marred by historical reminiscences and misunderstandings that occur so frequently between nations, as between people, that have much in common.

The book is also valuable for the lucid description of the main personages at work in this critical period, notably Keynes and White, the two chief architects of what eventually became the International Monetary Fund.

Perhaps the greatest single lesson to be learned from a study of this book for international economists, diplomats and lawyers, is the danger of making some abstract ideal or stock phrase such as "multilateralism" a guide to action, instead of studying an immensely complex problem of this kind against the context of national conditions, economic circumstances and political preparedness. The book ends with an account of the collapse of the proposed International Trade Organization (ITO), to which a subsequent volume may have to add the similar collapse of the far more modest substitute, the Office for Trade Cooperation (OTC). Significantly, the greatest advance in multilateralism has not been achieved on a general international level, despite the by no means negligible achievements of GATT, but in the more closely knit community of "Little Europe," where, essentially as a result of postwar political developments, the Coal and Steel Community is now certain to be followed by a common market and a European Atomic Energy Authority.

W. FRIEDMANN

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* Mention here neither assures nor precludes later review.

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BELGIUM—FRANCE—GERMAN FEDERAL REPUBLIC—
ITALY—LUXEMBOURG—NETHERLANDS

TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY *

Signed at Rome March 25, 1957.

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE GERMAN FEDERAL REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS,

RESOLVED to establish the foundations of an ever closer union among the European peoples,

DETERMINED to ensure the economic and social progress of their countries by common action in abolishing the barriers which divide Europe,

ASSIGNING to their efforts the main purpose of constantly improving the living and working conditions of their peoples,

REALISING that the removal of existing obstacles calls for concerted action in order to guarantee stable conditions of expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and ensure their harmonious development by reducing differences between the various regions and the backwardness of the less-favoured,

DESIROUS of contributing by means of a common commercial policy to the gradual removal of restrictions on international trade,

PURPOSING to confirm the ties which unite Europe and overseas countries and territories, and wishing to ensure their increasing prosperity in accordance with the principles of the United Nations Charter,

RESOLVED to strengthen the safeguard of liberty and peace by building up this combination of resources, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

HAVE DECIDED to set up a European Economic Community and to this end have designated as their Plenipotentiaries:

* Provisional English text. Since going to press a definite English text has been issued by the Secretariat of the Interim Committee for the Common Market and Euratom, Brussels. The treaty has been ratified by the governments of France, the Federal Republic of Germany, and Italy.

HIS MAJESTY THE KING OF THE BELGIANS:

M. Paul-Henri SPAAK, Minister for Foreign Affairs;
Baron J. Ch. SNOY et d'OPPUERS, Secretary-General of the Ministry of
Economic Affairs, Leader of the Belgian delegation to the Intergovern-
mental Conference;

THE PRESIDENT OF THE FRENCH REPUBLIC:

M. Christian PINEAU, Minister for Foreign Affairs;
M. Maurice FAURE, Parliamentary Under-Secretary in the Ministry of
Foreign Affairs;

THE PRESIDENT OF THE GERMAN FEDERAL REPUBLIC:

Dr. Konrad ADENAUER, Federal Chancellor;
Professor Dr. Walter HALLSTEIN, permanent Under-Secretary in the Min-
istry of Foreign Affairs;

THE PRESIDENT OF THE ITALIAN REPUBLIC:

M. Antonio SEGNI, President of the Council of Ministers;
Professor Gaetano MARTINO, Minister for Foreign Affairs;

HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG:

M. Joseph BECH, Minister of State, Minister for Foreign Affairs;
M. Lambert SCHAUS, Ambassador, Leader of the Luxembourg delegation
to the Intergovernmental Conference;

HER MAJESTY THE QUEEN OF THE NETHERLANDS:

M. Joseph LUNS, Minister for Foreign Affairs;
M. J. LINTHORST-HOMAN, Head of the Netherlands delegation to the
Intergovernmental Conference;

who, having exchanged their full powers, found in good and due form,
have agreed on the following provisions:

PART ONE. PRINCIPLES

ARTICLE 1

By the present Treaty, the High Contracting Parties establish among
themselves a European Economic Community.

ARTICLE 2

The Community's mission shall be, by establishing a common market and
gradually removing differences between the economic policies of Member
States, to promote throughout the Community the harmonious development
of economic activities, continuous and balanced expansion, increased sta-
bility, a more rapid improvement in the standard of living and closer re-
lations between its Member States. .

ARTICLE 3

With the objects set out in the preceding Article the Community's action shall include, on the conditions and at the rates provided for in the present Treaty:

(a) the removal of customs duties, as between Member States, and of quantitative restrictions on the importation and exportation of goods as well as of all other measures with equivalent effect,

(b) the establishment of a common customs tariff and a common commercial policy towards States outside the Community,

(c) the abolition, as between Member States, of obstacles to the free movement of persons, services and capital,

(d) the inauguration of a common agricultural policy,

(e) the inauguration of a common transport policy,

(f) the establishment of a system ensuring that competition shall not be hampered in the common market,

(g) the adoption of procedures to enable the economic policies of Member States to be co-ordinated and to remedy disequilibria in their balances of payments,

(h) the removal of differences in national laws so far as is necessary for the operation of the common market,

(i) the creation of a European Social Fund in order to enhance possibilities of employment for workers and contribute to the raising of their standard of living,

(j) the establishment of a European Investment Bank to facilitate economic expansion of the Community by creating fresh resources,

(k) the association of overseas countries and territories with the Community with a view to increasing trade and to pursuing in common efforts towards economic and social development.

ARTICLE 4

1. Responsibility for carrying out the tasks entrusted to the Community shall be vested in

—an Assembly

—a Council

—a Commission

—a Court of Justice.

Each of these institutions shall act within the limits of the powers conferred upon it by the present Treaty.

2. The Council and the Commission shall be assisted by an Economic and Social Committee exercising advisory functions.

ARTICLE 5

Member States shall take all appropriate general or special measures to ensure the fulfilment of the obligations resulting from the present Treaty or from the decisions of the institutions of the Community, and shall facilitate the accomplishment of its mission. *

They shall refrain from all measures likely to jeopardise achievement of the aims of the present Treaty.

ARTICLE 6

1. Member States, acting in close collaboration with the institutions of the Community, shall co-ordinate their respective economic policies so far as is necessary to achieve the aims of the present Treaty.

2. The institutions of the Community shall be careful not to endanger the internal and external financial stability of Member States.

ARTICLE 7

Within the field of application of the present Treaty and without prejudice to the special provisions included therein, all discrimination on the grounds of nationality shall be prohibited.

On the proposal of the Commission and after consulting the Assembly, the Council may, by the prescribed majority, lay down regulations prohibiting such discrimination.

ARTICLE 8

1. The common market shall be gradually established over a transitional period of 12 years.

The transitional period shall be divided into three stages of four years each, which may be altered on the conditions set out hereunder.

2. To each stage there shall be assigned a co-ordinated group of activities which must be undertaken and pursued concurrently.

3. Passage from the first to the second stage shall be conditional upon establishment of the fact that the main aims specifically laid down in the present Treaty for the first stage have been effectively achieved, and that, subject to the exceptions and procedures provided for in this Treaty, commitments have been met.

This fact shall be established at the end of the fourth year by the Council voting unanimously on a report by the Commission. However, a Member State may not prevent a unanimous decision by availing itself of its failure to fulfil its own obligations. In the absence of a unanimous decision the first stage shall automatically be extended for one year.

At the end of the fifth year, the Council shall establish the aforesaid fact under the same conditions. In the absence of a unanimous decision, the first stage shall be automatically extended for a further year.

At the end of the sixth year, the Council shall establish the aforesaid fact by a prescribed majority vote on a report by the Commission.

4. Within one month as from this last vote, each Member State which voted with the minority or, if the requisite majority was not obtained, any Member State shall be entitled to ask the Council to appoint an Arbitration Board whose decision shall bind all Member States and the institutions of the Community. The Arbitration Board shall consist of three members appointed by a unanimous vote of the Council taken on a proposal by the Commission.

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If the Council has not appointed the members of the Arbitration Board within one month of being asked to do so, they shall be appointed by the Court of Justice within a further period of one month.

The Arbitration Board shall appoint its own President.

It shall give its award within six months of the date of the vote by the Council referred to in the last sub-paragraph of paragraph 3.

5. The second and third stages may not be extended or curtailed except by unanimous decision of the Council taken on a proposal by the Commission.

6. The provisions of the foregoing paragraphs shall not have as their result any extension of the transitional period beyond a total duration of fifteen years from the date of the entry into force of the present Treaty.

7. Subject to the exceptions or derogations provided for in the present Treaty, the expiration of the transitional period shall mark the final date for the entry into force of the whole body of regulations provided for, and for the completion of all the operations entailed by the establishment of the common market.

PART TWO. BASES OF THE COMMUNITY

CHAPTER I

Free Movement of Goods

ARTICLE 9

1. The Community is based upon a customs union covering the exchange of all goods and comprising both the abolition, as between Member States, of customs duties on imports and exports and all taxes with equivalent effect, and also the adoption of a common customs tariff in their relations with outside countries.

2. The provisions of Section 1, Sub-section 1 and of Section 2 of the present Chapter shall apply to products originating in Member States and to those coming from outside countries which are freely available in Member States.

ARTICLE 10

1. Products freely available in a Member State shall be understood to mean products coming from an outside country, in respect of which the necessary import formalities have been carried out and the customs duties or equivalent taxes have been collected in the Member State in question, and in respect of which a total or partial drawback on such duties or taxes has not been granted.

2. Before the end of the first year following the entry into force of the present Treaty, the Commission shall decide upon the measures required to ensure the administrative co-operation necessary to the application of paragraph 2 of Article 9, taking due account of the need for reducing to the minimum the formalities imposed on trade.

Before the end of the first year following the entry into force of the

present Treaty, the Commission shall decide upon the provisions applicable, in trade between Member States, to goods originating in one of them the manufacture of which has involved the use of products on which the customs duties or equivalent taxes chargeable on them in the exporting Member State have not been levied or in respect of which a total or partial drawback on such duties or taxes has not been granted.

When adopting such provisions, the Commission shall take account of the regulations laid down for the abolition of customs duties within the Community and for the progressive application of a common customs tariff.

ARTICLE 11

The Member States shall take all appropriate measures to enable their Governments to fulfil, within the prescribed time-limits, the obligations with regard to customs duties which are incumbent on them under the terms of the present Treaty.

SECTION 1--THE CUSTOMS UNION

SUB-SECTION 1: *The abolition of customs duties as between Member States*

ARTICLE 12

Member States shall refrain from introducing, as between themselves, any new customs duties or equivalent taxes on import or exports, and from raising the level of those they impose in their commercial relations with each other.

ARTICLE 13

1. Customs duties on imports applied between Member States shall be progressively abolished by them, during the transitional period, under the conditions provided for in Articles 14 and 15.

2. Taxes of equivalent effect to customs duties on imports applied between Member States shall be progressively abolished by them during the transitional period. The Commission shall issue directives as to the rate at which this abolition shall be effected. It shall take as a basis the rules contained in paragraphs 2 and 3 of Article 14 and also the directives issued by the Council in application of the said paragraph 2.

ARTICLE 14

1. In the case of each product, the basic duty to which the successive reductions shall apply shall be the duty applicable on 1 January 1957.

2. The timing of the reductions shall be fixed as follows:

(a) during the first stage, the first reduction shall be made one year after the entry into force of the present Treaty; the second shall be made eighteen months later; the third, at the end of the fourth year following the entry into force of the present Treaty; .

(b) during the second stage, a reduction shall be made eighteen months after the beginning of this stage; a second reduction, eighteen months after the preceding one; a third, one year later;

(c) the remaining reductions shall be carried out during the third stage; the Council, voting with the prescribed majority on a proposal by the Commission, shall issue directives fixing the timing of such reductions

3. At the time of the first reduction, Member States shall, for each product, apply as between themselves a duty equal to the basic duty reduced by 10%.

At the time of each subsequent reduction, each Member State shall reduce the total of the duties levied by it in such a way as to reduce its total receipts from customs duties as defined in paragraph 4 below by 10%, it being understood that the reduction in the case of each product shall be equal to at least 5% of the basic duty.

Nevertheless, in the case of products on which there would still remain a duty of more than 30%, each reduction shall be equal to at least 10% of the basic duty.

4. The total customs receipts of each Member State, referred to in paragraph 3 above, shall be calculated by multiplying the value of its imports from other Member States during the year 1956 by the basic duties.

5. Any special problems raised by the application of the foregoing paragraphs shall be settled by directives issued by the Council and voted by the prescribed majority on a proposal by the Commission.

6. Member States shall report to the Commission on the method by which the foregoing regulations for the reduction of duties is applied. They shall endeavour to ensure that, in the case of each product, the reduction of duty shall amount to the following

—by the end of the first stage: at least 25% of the basic duty;

—by the end of the second stage: at least 50% of the basic duty.

If the Commission finds that there is a risk of the objectives laid down in Article 13 and the percentages fixed in the present paragraph proving impossible to achieve, it shall make any necessary recommendations to the Member States.

7. The provisions of the present Article may be amended by the Council, by a unanimous vote on a proposal of the Commission and after consulting the Assembly.

ARTICLE 15

1. Independently of the provisions of Article 14, any Member State may, during the transitional period, suspend in whole or in part the collection of the duties levied by it on products imported from other Member States. It shall inform the other Member States and the Commission thereof.

2. Member States declare their readiness to reduce their customs duties vis-a-vis other Member States more rapidly than is provided for in Article 14, should their general economic situation and the situation of the sector concerned so permit.

The Commission shall make recommendations to this end to the Member States concerned.

ARTICLE 16

Member States shall abolish as between themselves, not later than at the end of the first stage, customs duties on exports and taxes having an equivalent effect.

ARTICLE 17

1. The provisions contained in Articles 9 to 15, paragraph 1, inclusive shall apply to customs duties of a fiscal character. Nevertheless, such duties shall not be taken into consideration for purposes of calculating either total customs receipts or the reduction in total duties referred to in paragraphs 3 and 4 of Article 14.

At each stage of reduction such duties shall be lowered by at least 10% of the basic duty. Member States may reduce them more rapidly than is provided for in Article 14.

2. Member States shall inform the Commission, before the end of the first year from the entry into force of the present Treaty, of the customs duties of a fiscal character levied by them.

3. Member States shall retain the right to substitute for these duties an internal tax, in accordance with the provisions of Article 95.

4. If the Commission should find that serious difficulties exist in a Member State in the way of such substitution, it shall authorise such State to retain the duty in question on condition that it be abolished within at latest six years of the entry into force of the present Treaty. Authorisation for such retention must be requested before the end of the first year following the entry into force of the present Treaty.

SUB-SECTION 2: *Establishment of a Common Customs Tariff*

ARTICLE 18

Member States declare their willingness to contribute towards the development of international commerce and the reduction of impediments to trade by concluding agreements which, on a basis of reciprocity and mutual advantage, aim at reducing customs duties below the general level that they might claim to enforce as a result of the establishment between themselves of a customs union.

ARTICLE 19

1. Under the conditions and within the limits laid down below, the duties applied under the common customs tariff shall be fixed at the level of the arithmetical average of the duties levied in the four customs areas covered by the Community.

2. The duties taken into account for calculating this average shall be those levied by Member States on 1 January 1957.

Nevertheless, in the case of the Italian tariff, the duty applied shall be understood as being that levied before the temporary 10% reduction. Furthermore, in the case of items in this tariff where the duty charged is fixed by a convention, this duty shall be substituted for the duty thus

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defined, provided always that it does not exceed the latter by more than 10%. If the duty fixed by the convention is more than 10% higher than the duty thus defined which is applied, the latter, increased by 10%, shall be taken into account for calculating the arithmetical average.

With regard to the tariff headings contained in List A, the duties shown in that List shall be substituted for the duties applied for the purpose of calculating the arithmetical average.

3. The duties applied under the common customs tariff shall not exceed:

(a) 3% in the case of products coming under the tariff headings mentioned in List B;

(b) 10% in the case of products coming under the tariff headings mentioned in List C;

(c) 15% in the case of products coming under the tariff headings mentioned in List D;

(d) 25% in the case of products coming under the tariff headings mentioned in List E; if under the tariff of the Benelux countries a duty of not more than 3% is levied on these products, such duty shall be raised to 12% for the purpose of calculating the arithmetical average.

4. The duties to be levied on products mentioned in List F shall be those laid down in that List.

5. The Lists of tariff headings referred to in the present Article and in Article 20 shall form Annex I to the present Treaty.*

ARTICLE 20

The duties to be levied on products in List G shall be settled by negotiation between Member States. Each Member State may add further products to this list up to 2% of the total value of its imports from outside countries during the year 1956.

The Commission shall do everything possible to ensure that such negotiations are undertaken before the end of the second year following the entry into force of the present Treaty and concluded before the end of the first stage.

If it proves impossible, in the case of certain products, to reach agreement within these time-limits, the Council, on the proposal of the Commission and by unanimous vote up to the end of the second stage, and subsequently by the prescribed majority, shall fix the duties to be applied under the common customs tariff.

ARTICLE 21

1. Any technical difficulties which may arise in the application of Articles 19 and 20 shall be settled, within two years of the entry into force of the present Treaty, by directives issued by the Council, voting with the prescribed majority, on a proposal by the Commission.

2. Before the end of the first stage or at latest at the time when the duties are fixed, the Council, voting with the prescribed majority, shall

* Not printed here.

decide what adjustments are necessary to ensure the internal harmony of the common customs tariff following the application of the rules laid down in Articles 19 and 20, due regard being had, in particular, to the degree of processing undergone by the various goods to which the common tariff applies.

ARTICLE 22

Within the two years following the entry into force of the present Treaty, the Commission shall decide to what extent the customs duties of a fiscal character mentioned in paragraph 2 of Article 17 shall be taken into account for calculating the arithmetical average referred to in paragraph 1 of Article 19. The Commission shall take due account of the protective character such duties may possess.

Within a period of not more than six months after this decision, any Member State may request that the procedure provided for in Article 20 shall be adopted with respect to the product in question, notwithstanding the limit prescribed in that Article, which shall not be invoked in this case.

ARTICLE 23

1. For the purpose of the progressive establishment of the common customs tariff, Member States shall amend the tariffs they apply to outside countries, in the ways shown hereunder:

(a) in the case of tariff groups on which the duties effectively levied on 1 January 1957 do not differ by more than 15% in either direction from the duties applicable under the common customs tariff, the latter duties shall be applied at the end of the fourth year following the entry into force of the present Treaty;

(b) in the case of other tariff headings each Member State shall, from the same date, apply a duty by which the difference between the duty effectively levied on 1 January 1957 and that of the common customs tariff is reduced by 30%;

(c) at the end of the second stage this difference shall again be reduced by 30%;

(d) in the case of tariff headings for which the duties under the common customs tariff are not known at the end of the first stage, each Member State shall, within the six months following the Council decision taken in accordance with the provisions of Article 20, apply such duties as shall result from the application of the rules contained in the present paragraph.

2. Any Member State which has been granted the authorisation provided for in paragraph 4 of Article 17 shall be exempted from applying the foregoing provisions with regard to the tariff headings covered by the authorisation so long as the latter remains valid. When such authorisation expires, the Member State in question shall levy such duty as shall result from the application of the rules contained in the preceding paragraph.

3. The common customs tariff shall be applied in its entirety by, at latest, the end of the transitional period.

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ARTICLE 24

For the purpose of bringing their duties into line with the common customs tariff, Member States shall remain free to amend their customs duties more rapidly than is provided for in Article 23.

ARTICLE 25

1. If the Commission finds that certain products in List B, C or D are not being produced in the Member States in sufficient quantities to meet the needs of one of them, and that a substantial proportion of these needs is traditionally covered by imports from an outside country, the Council, voting with the prescribed majority, on a proposal of the Commission, shall grant to the Member States concerned tariff quotas at a reduced rate of duty, or duty free.

Such quotas may not exceed the limits beyond which there might be a danger of activities being transferred to the detriment of other Member States.

2. In respect of the products in List E, and those in List G for which the level of duty shall have been fixed in accordance with the procedure provided for in the third paragraph of Article 20, the Commission shall, at the request of any Member State concerned, grant such State tariff quotas at a reduced rate of duty or duty free, in cases where a change in sources of supply or a shortage of supplies within the Community might injuriously affect the processing industries of the Member State concerned.

Such quotas may not exceed the limits beyond which there might be a danger of activities being transferred to the detriment of other Member States.

3. In respect of the products listed in Annex II to the present Treaty,^o the Commission may authorise any Member State to suspend, in whole or in part, the collection of the duties applicable or may grant to such Member State tariff quotas at a reduced rate of duty or duty free, provided always that no serious disturbance to the market in the products concerned can result thereby.

4. The Commission shall keep under periodical review any quotas granted in virtue of the present Article.

ARTICLE 26

The Commission may authorise any Member State faced by special difficulties to deter the reducing or the raising, in accordance with the provisions of Article 23, of duties under certain heads of its tariff.

Such authorisation may be granted only for a limited period and only for a group of tariff headings which together do not represent more than 5% by value of the total imports of the State in question from outside countries during the latest year for which statistics are available.

^o Not printed here.

ARTICLE 27

Before the end of the first stage, Member States shall, so far as may be necessary, take steps to align their laws, regulations and administrative provisions in regard to customs matters. The Commission shall to this end make all appropriate recommendations to Member States.

ARTICLE 28

All autonomous alterations or suspensions of duties of the common customs tariff shall be decided on by the unanimous vote of the Council. Nevertheless, after the end of the transitional period, the Council, voting with the prescribed majority, on a proposal by the Commission, may decide on alterations or suspensions not exceeding 20% of the rate of any duty, for a maximum period of six months. Such alterations may not be maintained in force, under the same conditions, except for a second period of six months.

ARTICLE 29

In carrying out the tasks entrusted to it under the present Sub-section, the Commission shall have regard to:

(a) the need for promoting trade between the Member States and outside countries;

(b) the development of competitive conditions within the Community, to the extent to which such development will result in increasing the competitive power of firms;

(c) the Community's requirements in the matter of raw materials and semifinished products, whilst ensuring that competitive conditions between Member States with regard to finished products are not interfered with;

(d) the need for avoiding serious disturbances in the economic life of Member States and for ensuring the rational development of production and the expansion of consumption within the Community.

SECTION 2—THE ABOLITION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES

ARTICLE 30

Quantitative restrictions on imports and all measures having an equivalent effect shall be prohibited between Member States, without prejudice to the following provisions.

ARTICLE 31

Member States shall refrain from introducing as between themselves any new quantitative restrictions or measures having an equivalent effect.

Nevertheless, this obligation shall apply only to the level of liberalisation attained in application of the decisions of the Council of the Organisation for European Economic Co-operation of 14 January 1955. Member States shall communicate to the Commission, not later than six months after the

entry into force of the present Treaty, the lists of the products they have freed in application of these decisions. The lists thus communicated shall be consolidated between Member States.

ARTICLE 32

In their trade with each other, Member States shall refrain from increasing the restrictive effects of quotas or other measures having equivalent effect in existence at the date of the entry into force of the present Treaty.

Such quotas shall be abolished by, at latest, the end of the transitional period. During this period, they shall be progressively abolished under the conditions specified hereunder.

ARTICLE 33

1. One year after the entry into force of the present Treaty, each of the Member States shall convert any bilateral quotas granted to other Member States into global quotas open, without discrimination, to all other Member States.

On the same date, Member States shall enlarge the whole of the global quotas thus established so as to attain an increase of at least 20% in their total value, compared with the preceding year. Nevertheless, each global quota for each product shall be increased by at least 10% each year.

The quotas shall be increased each year in accordance with the same rules and in the same proportions, by comparison with the preceding year.

The fourth increase shall take place at the end of the fourth year as from the entry into force of the present Treaty; the fifth increase shall take place one year after the beginning of the second stage.

2. In the case of a product which has not been freed, if the global quota does not amount to 3% of the national output of the State concerned, a quota equal to at least 3% of such output shall be established within, at latest, one year from the entry into force of the present Treaty. After the second year, this quota shall be raised to 4% and after the third year to 5%. Thereafter, the Member State concerned shall increase the quota by at least 15% each year.

If there is no national output, the Commission shall fix an appropriate quota by way of decision.

3. By the end of the tenth year, each quota must be equal to at least 20% of the national output.

4. If the Commission finds, by decision, that during two successive years the imports of any product have been below the level of the quota opened, such global quota may not be taken into consideration for the purpose of calculating the total value of the global quotas. In such case, the Member State shall abolish the quota for the product in question.

5. In the case of quotas representing more than 20% of the national output of the product in question, the Council, voting with the prescribed majority on a proposal by the Commission, may reduce the minimum figure of 10% laid down in paragraph 1 above. Nevertheless, such an alteration

shall not affect the obligation to increase the total value of global quotas by 20% each year.

6. Member States which have gone beyond the obligations imposed on them in respect of the level of liberalisation attained in implementation of the decisions of the Council of the Organisation for European Economic Co-operation of 14 January 1955, shall have the right to take into account the amount of imports freed by autonomous measures when calculating the annual total of 20% provided for in paragraph 1 above. Such calculation shall be submitted for the prior approval of the Commission.

7. The Commission shall issue directives laying down the procedure and the rate according to which Member States shall abolish between themselves any measures with effects equivalent to those of quotas, in existence on the date of the entry into force of the present Treaty.

8. If the Commission finds that the application of the provisions of the present Article and, in particular, of the provisions concerning percentages, does not ensure the progressive abolition of quotas as provided for in the second paragraph of Article 32, the Council, on the proposal of the Commission and by a unanimous vote during the first stage, and subsequently with the prescribed majority, may amend the procedure referred to in the present Article and, in particular, may raise the percentages fixed.

ARTICLE 34

1. Quantitative restrictions on exports and any measures having equivalent effect shall be prohibited between Member States.

2. Member States shall abolish, not later than at the end of the first stage, all quantitative restrictions on exports and all measures having an equivalent effect in existence at the time of the entry into force of the present Treaty.

ARTICLE 35

Member States declare their readiness to abolish, vis-a-vis other Member States, their quantitative restrictions on imports and exports more rapidly than is provided for in the preceding Articles, should their general economic situation and the situation of the sector concerned so permit.

The Commission shall make recommendations to this end to the Member States concerned.

ARTICLE 36

The provisions of Articles 30 to 34 inclusive shall not debar prohibitions or restrictions in respect of imports, exports or transit when these are justified on grounds of public morality, public order or public security, the protection of the health or life of individuals or animals or the preservation of plant life, the protection of national possessions of artistic, historical or archeological value or the protection of industrial or commercial property. Nevertheless such prohibitions or restrictions must not constitute either a means of arbitrary discrimination, or a disguised restriction on trade between Member States.

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ARTICLE 37

1. Member States shall progressively adjust any national monopolies of a commercial character in such a way as to ensure the disappearance, at the end of the transitional period, of all discrimination between the nationals of Member States in respect of conditions of supply or sale.

The provisions of the present Article shall apply to any body by means of which a Member State shall, *de jure* or *de facto*, either directly or indirectly, control, direct or appreciably influence imports or exports between Member States. These provisions shall apply also to delegated State monopolies.

2. Member States shall refrain from any new measures that are contrary to the principles laid down in paragraph 1 above, or that may limit the scope of the Articles relating to the abolition of customs duties and quantitative restrictions between Member States.

3. The rate at which the measures provided for in paragraph 1 above shall be taken shall be adapted to the rate at which quantitative restrictions on the same products are abolished in accordance with the provisions of Articles 30 to 34 inclusive.

In cases where a product is the subject of a national monopoly of a commercial character only in one or certain of the Member States, the Commission may authorise the application by other Member States of measures of protection for so long as the adaptation provided for in paragraph 1 above has not taken place, the conditions and methods of application of such measures being determined by the Commission.

4. In the case of a monopoly of a commercial character accompanied by regulations designed to facilitate sales and to maintain price-levels for agriculture products, the regulations laid down in the present Article must be applied in such a way as to provide equivalent guarantees in respect of the employment and standard of living of the producers concerned, due account being taken of the rate at which adaptations can be made and of the degrees of specialisation involved.

5. The obligations incumbent on Member States shall, moreover, be binding only so far as they are compatible with existing international agreements.

6. As soon as the first stage has begun, the Commission shall make recommendations as to the methods and the rate according to which the adaptation provided for in the present Article shall be carried out.

CHAPTER II

Agriculture

ARTICLE 38

1. The common market shall extend to agriculture and trade in agricultural products. Agricultural products shall be taken to mean the products of the soil, of stock breeding and of fishing, and also semi-processed goods directly connected with such products. •

2. Except where there are provisions to the contrary in Articles 39 to 46 inclusive, the rules for the establishment of the common market shall apply to agricultural products.

3. Products subject to the provisions of Articles 39 to 46 inclusive are listed in Annex II of the present Treaty.* However, within two years of the entry into force of the present Treaty the Council, voting with the prescribed majority, on a proposal by the Commission, shall decide what products are to be added to this list.

4. The operation and development of the common market for agricultural products must be accompanied by the establishment of a common agricultural policy among the Member States.

ARTICLE 39

1. The purpose of the common agricultural policy shall be:

(a) to increase agricultural production by developing technical progress, ensuring the rational development of agricultural output and maximum utilisation of the factors of production, especially manpower,

(b) to ensure in this way a fair standard of living for the agricultural population, in particular by increasing the individual earnings of agricultural workers,

(c) to stabilise markets,

(d) to guarantee supplies,

(e) to ensure reasonable prices for deliveries to the consumer.

2. In working out a common agricultural policy and the special methods which it may involve, due regard shall be paid to:

(a) the special nature of agricultural work, owing to the social structure of agriculture and to structural and natural disparities between the various agricultural regions,

(b) the need to make advisable changes gradually,

(c) the fact that in Member States agriculture is a sector closely linked with the rest of the economy.

ARTICLE 40

1. Member States shall gradually develop a common agricultural policy during the transitional period and shall establish it at latest by the end of that period.

2. In order to achieve the aims set out in Article 39 a common organisation for agricultural markets shall be established.

This organisation shall take one of the following forms, depending on the products concerned:

(a) a system of common rules to control competition,

(b) the compulsory co-ordination of the various national market organisations,

(c) a European Marketing Board.

3. The common organisation in one of the forms mentioned in paragraph 2 may comprise all measures necessary to achieve the aims specified in Ar-

* Not printed here.

ticle 39, in particular, price controls, subsidies on the production and sale of various products, arrangements for stock-piling and carry-forward, and common machinery for stabilising imports and exports.

The organisation must confine itself to pursuing the aims set out in Article 39 and avoid all discrimination between producers or consumers in the Community. Any common price policy must be based on common criteria and uniform methods of calculation.

4. In order to enable the common organisation referred to in paragraph 2 to achieve its aims, one or more agricultural guidance and guarantee funds may be established.

ARTICLE 41

In order to achieve the aims set out in Article 39 the common agricultural policy may provide in particular for:

(a) the effective co-ordination of agricultural training schemes, research and the popularisation of agronomy, which may involve projects or institutions financed in common,

(b) common action to increase consumption of certain products.

ARTICLE 42

The provisions of the Section relating to the control of competition shall apply to the production and sale of agricultural products only in so far as determined by the Council within the framework of the provisions and in accordance with the procedure laid down in Article 43, paragraphs 2 and 3, and with due regard to the aims stated in Article 39.

The Council may, in particular, authorise the granting of assistance:

(a) to protect undertakings handicapped by structural or natural conditions,

(b) in connection with economic development programmes.

ARTICLE 43

1. In order to determine the main lines of a common agricultural policy, the Commission shall convene a conference of Member States on the entry into force of the Treaty, to enable them to compare their agricultural policies and, in particular, draw up a statement of their resources and needs.

2. Within two years of the entry into force of the present Treaty, the Commission, after consulting the Economic and Social Committee and with due regard to the work of the conference provided for in paragraph 1, shall submit proposals for working out and implementing a common agricultural policy, including the replacement of national organisations by one of the forms of common organisation provided for in Article 40, paragraph 2, and the implementation of the measures specifically mentioned in the present Part of the Treaty.

These proposals must pay due regard to the interdependence of the agricultural questions raised in this Part of the Treaty.

On the proposal of the Commission and after consulting the Assembly, the Council, voting unanimously during the first two stages and thereafter

with the prescribed majority, shall issue regulations or directives, or take decisions without prejudice to the recommendations it may make.

3. The Council, voting with the prescribed majority, may, on the conditions provided for in the preceding paragraph, replace national market organisations by the common organisation provided for in Article 40, paragraph 2:

(a) if the common organisation offers to Member States opposed to this measure, and themselves possessing a national organisation for the products in question, equivalent guarantees concerning the employment and standard of living of the producers in question, due regard being paid to the rate of the adaptations that are possible and to the degrees of specialisation required, and

(b) if such organisation can ensure for trade within the Community conditions similar to those prevailing in national markets.

4. If a common organisation is set up for certain raw materials, while none yet exists for the corresponding processed products, the raw materials in question used for processed products intended for export to outside countries may be imported from outside the Community.

ARTICLE 44

1. During the transitional period, so far as the progressive abolition of customs duties and quantitative restrictions between Member States may result in prices likely to jeopardise the aims set out in Article 39, each Member State shall be allowed to apply to certain products, without discrimination and in place of quotas, and only to such an extent as not to impede the expansion of the volume of trade provided for in Article 45, paragraph 2, a system of minimum prices below which imports may be:

(a) temporarily suspended or reduced, or

(b) made conditional on the price at which they take place being above the minimum fixed for the product in question.

In the second case, the minimum prices shall be fixed exclusive of customs duties.

2. The minimum prices must not result in a reduction of the trade existing between Member States at the time when the present Treaty enters into force, nor impede a progressive expansion of such trade, and they must not be applied in such a way as to impede the development of natural preference between the Member States.

3. As soon as the present Treaty enters into force, the Council, on a proposal of the Commission, shall determine objective criteria for establishing minimum price systems and for fixing such prices.

These criteria shall, in particular, take into consideration average national costs of production in the Member State enforcing the minimum price, and the situation of the various undertakings in relation to such costs, and also the need to promote a progressive improvement in farming, and the adaptations and specialisation necessary within the common market.

The Commission shall also propose a procedure for revising these criteria in order to allow for and accelerate technical progress and to bring prices within the common market increasingly into line with one another.

These criteria and the procedure for revision shall be determined by a unanimous vote of the Council during the first three years after the entry into force of the present Treaty.

4. Until the Council's decision takes effect Member States may fix minimum prices on condition that they first communicate them to the Commission and to other Member States so as to enable them to submit their comments.

As soon as the Council has taken its decision, Member States shall fix minimum prices on the basis of the criteria established under the foregoing conditions.

The Council, voting with the prescribed majority on a proposal of the Commission, may amend the decisions taken if they do not conform to the criteria thus determined.

5. From the beginning of the third stage, and if for certain products it shall not yet have been possible to establish the aforementioned objective criteria, the Council, voting with the prescribed majority on a proposal of the Commission, may change the minimum prices applied to these products.

6. At the expiry of the transitional period, a list of minimum prices still in force shall be drawn up. The Council, voting on a proposal by the Commission with a majority of nine votes, with the weighting provided for in Article 148, paragraph 2 (1), shall determine the system to be applied within the framework of the common agricultural policy.

ARTICLE 45

1. Until one of the forms of common organisation provided for in Article 40, paragraph 2, replaces the national organisations, the expansion of trade in respect of products for which certain Member States

(a) have provisions for guaranteeing a market to their national producers, and

(b) have an import demand,

shall be pursued by the conclusion of agreements or long-term contracts between Member States and exporting countries.

These agreements or contracts must be directed towards the progressive abolition of all discrimination in the application of these provisions to the various producers in the Community.

The said agreements or contracts shall be concluded during the first stage and with due regard to the principle of reciprocity.

2. With regard to quantities, these agreements or contracts shall take as their basis the average volume of trade between Member States in the products in question during the three years preceding the entry into force of the present Treaty, and shall provide for an increase in that volume within the limit of existing needs, with due regard to traditional trade currents.

With regard to prices, these agreements or contracts shall enable producers to dispose of the agreed quantities at prices progressively approaching those paid to national producers in the home market of the purchasing country.

This alignment of prices must be timed as evenly as possible and must be completed by the end of the transitional period at latest.

Prices shall be negotiated between the parties concerned within the framework of directives drawn up by the Commission for the implementation of the preceding two paragraphs.

Should the first stage be extended, the implementation of the agreements or contracts shall continue under the conditions applicable at the end of the fourth year after the entry into force of the present Treaty, and the obligation to increase quantities and to align prices shall be suspended until entry on the second stage.

Member States shall take every opportunity provided by their laws, particularly as regards import policy, to effect the conclusion and implementation of these agreements or contracts.

3. So far as Member States require raw materials for the manufacture of products intended for export outside the Community in competition with producers in outside countries, these agreements or contracts shall not interfere with imports of raw materials for this purpose from outside countries. Nevertheless, this provision shall not apply if the Council unanimously decides to grant the payments necessary to compensate the excess price paid for imports for this purpose on the basis of these agreements or contracts, by comparison with the prices paid for the same supplies obtained on the world market.

ARTICLE 46

In a Member State where a marketing organisation exists for a product, or where there are internal regulations having an equivalent result, affecting the competition of a similar product in another Member State, a compensatory entry due shall be charged by Member States on this product when it comes from the Member State where the marketing organisation or regulations exist, unless that State charges a compensatory exit due.

The Commission shall fix the amount of these dues so far as is necessary to restore the balance; it may also authorise resort to other measures, defining their conditions and methods of implementation.

ARTICLE 47

With regard to the functions of the Economic and Social Committee in the implementation of this part of the Treaty, its agricultural section shall place itself at the disposal of the Commission for the purpose of preparing for the Committee's discussions in accordance with the provisions of Articles 197 and 198.

CHAPTER III

The Free Movement of Persons, Services and Capital

SECTION 1—THE WORKERS

ARTICLE 48

1. There shall be free movement of workers within the Community at latest on the expiry of the transitional period.

2. This shall involve the abolition of all discrimination based on nationality among workers of the Member States as regards employment, pay and other working conditions.

3. It shall include the right, subject to limitations justified by reasons of public order, public safety and public health

(a) to accept genuine offers of employment,

(b) to move freely for this purpose within the territory of Member States,

(c) to sojourn in any Member State in order to carry on an employment in conformity with the laws, regulations and administrative rules governing the employment of that State's workers,

(d) to live in the territory of a Member State after working there, on conditions which shall be specified in regulations to be laid down by the Commission.

4. The provisions of the present Article shall not apply to employment with the public authorities.

ARTICLE 49

As soon as the present Treaty enters into force, the Council, on a proposal of the Commission and after consulting the Economic and Social Committee, shall, by means of directives or regulation decree the necessary measures to enable the free movement of workers to be progressively realised, as defined in the preceding Article, in particular

(a) by ensuring close collaboration between national labour administrations,

(b) by progressively abolishing administrative procedures and practices and time-limits in respect of taking of available employment prescribed either under internal law or under agreements previously concluded between Member States, the maintenance of which would impede the freeing of the movement of workers,

(c) by progressively abolishing all time-limits and other restrictions prescribed either under internal law or under agreements previously concluded between Member States, which impose on workers of other Member States conditions for the free choice of employment different from those imposed on nationals,

(d) by setting up suitable machinery for bringing together offers of employment and requests for employment, and for balancing them in such a way as to avoid serious threats to the standard of living and employment in the various regions and industries.

ARTICLE 50

Member States shall encourage the exchange of young workers under a common programme.

ARTICLE 51

The Council, voting unanimously on a proposal by the Commission, shall adopt the social security measures necessary to ensure the free movement

of workers, more particularly by introducing a system under which migrant workers and their legal representatives will be guaranteed:

(a) that all periods taken into consideration by the national laws of the different countries for the granting of benefits and for computing them will be totalled up,

(b) that benefits will be paid to persons resident in the territories of Member States.

SECTION 2—THE RIGHT OF ESTABLISHMENT

ARTICLE 52

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of one Member State in the territory of another Member State shall be progressively abolished during the transitional period. Such progressive abolition shall extend also to restrictions on the setting-up of branches or subsidiaries by nationals of one Member State established in the territory of another Member State.

Freedom of establishment shall include the right to engage in and carry on non-wage-earning activities, and also the setting-up and management of commercial undertakings, in particular of companies within the meaning of Article 58, paragraph 2, under the conditions laid down by the laws of the Member State in question for its own nationals, subject to the provisions of the Section relating to capital.

ARTICLE 53

Member States shall not introduce any new restrictions on the establishment of nationals of other Member States in their territories, subject only to the provisions of the present Treaty.

ARTICLE 54

1. Before the expiry of the first stage, the Council, voting unanimously on a proposal by the Commission and after consulting the Economic and Social Committee and the Assembly, shall lay down a general programme for the abolition of restrictions on freedom of establishment existing within the Community. The Commission shall submit its proposal to the Council during the first two years of the first stage.

For each category of activity the programme shall fix the general conditions for achieving freedom of establishment and, in particular, the stages by which it shall be attained.

2. In order to implement the general programme or, if no such programme exists, to complete one stage towards the achievement of freedom of establishment for a specific activity, the Council, voting unanimously until the end of the first stage and thereafter with the prescribed majority, shall issue directives on a proposal by the Commission and after consulting the Economic and Social Committee and the Assembly.

3. The Council and the Commission shall exercise the functions devolving upon them under the above provisions, in particular:

(a) by granting priority, in general, to activities in regard to which freedom of establishment constitutes a specially valuable contribution to the development of production and trade,

(b) by ensuring close collaboration between the competent national services with a view to ascertaining the special situation of the various activities concerned within the Community,

(c) by abolishing administrative procedures and practices, whether operated under national laws or under agreements previously concluded between Member States, the maintenance of which would impede freedom of establishment,

(d) by ensuring that wage-earners of one Member State employed in the territory of another Member State may remain in that territory for the purpose of undertaking non-wage-earning activities, if they satisfy the conditions which they would have been required to satisfy, had they come to that State at the time when they wished to engage in such activities,

(e) by enabling a national of one Member State to acquire and exploit landed property in the territory of another Member State, so far as there is no infringement of the principles laid down in Article 39, paragraph 2,

(f) by applying the progressive abolition of restrictions on freedom of establishment, in each branch of activity under consideration, both to the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State, and also to the conditions governing admissions of employees of the principal establishment to the managerial and supervisory organs of such agencies, branches and subsidiaries,

(g) by co-ordinating, so far as is necessary and with a view to ensuring their equivalence, the guarantees demanded in Member States from companies within the meaning of Article 58, paragraph 2, for the purpose of protecting the interests both of those associated with the company and of third parties,

(h) by ensuring that conditions of establishment shall not be rendered nugatory by any form of aid granted by Member States.

ARTICLE 55

Activities which, in any State, come, even incidentally, within the sphere of the exercise of public authority shall be exempted from the application of the provisions of the present Section so far as that State is concerned.

The Council, voting with the prescribed majority on a proposal by the Commission, may exempt certain activities from the application of the provisions of the present Section.

ARTICLE 56

1. The provisions of the present Section, and the measures enacted in virtue thereof, shall not prejudice the implementation of laws, regulations and administrative rules providing for special treatment for foreign na-

tionals which are justified by reason of public order, public safety and public health.

2. Before the expiry of the transitional period, the Council, voting unanimously on a proposal by the Commission and after consulting the Assembly, shall issue directives for the co-ordination of the aforementioned laws, regulations and administrative rules. However, after the end of the second stage, the Council, voting with the prescribed majority on a proposal by the Commission, shall issue directives for co-ordinating provisions which, in each Member State, fall within the sphere of regulations or administrative rules.

ARTICLE 57

1. In order to facilitate admittance to non-wage-earning activities and the exercise thereof, the Council, voting unanimously during the first stage and thereafter with the prescribed majority, on a proposal by the Commission and after consulting the Assembly, shall issue directives for the reciprocal recognition of diplomas, certificates and other titular qualifications.

2. For the same purpose, the Council, voting on a proposal by the Commission and after consulting the Assembly, shall, before the expiry of the transitional period, issue directives for co-ordinating the laws, regulations and administrative rule of Member States concerning admission to non-wage-earning activities and the exercise thereof. A unanimous vote shall be required on matters which, in at least one Member State, are the subject of legislation, and on measures relating to the protection of savings, in particular to banking and the issue of credit, and to the conditions governing the exercise of the medical, para-medical and pharmaceutical professions in the various Member States. In all other cases the Council shall vote unanimously during the first stage and thereafter with the prescribed majority.

3. In the case of the medical and para-medical and pharmaceutical professions, the progressive removal of restrictions shall be subject to the co-ordination of conditions for their exercise in the various Member States.

ARTICLE 58

Companies established in conformity with the laws of a Member State and having their registered offices, central management or main establishment within the Community, shall for the purposes of the present Section be assimilated to individuals who are nationals of Member States.

By companies shall be meant companies under civil or commercial law, including co-operative societies and other legal persons under public or private law, with the exception of non-profit-making associations.

SECTION 3—SERVICES

ARTICLE 59

Within the framework of the provisions hereunder, restrictions on the free rendering of services within the Community shall be progressively

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abolished during the transitional period in respect of nationals of Member States who are established in a country of the Community other than that of the person to whom the services are rendered.

The Council may, by a unanimous vote on a proposal by the Commission, extend the application of the provisions of the present Section to cover services rendered by nationals of any outside state who are established within the Community.

ARTICLE 60

Services within the meaning of the present Treaty shall be deemed to include services normally rendered for payment, so far as they are not governed by the provisions relating to the free movement of goods, capital and persons.

Services shall include, in particular:

- (a) activities of an industrial character,
- (b) activities of a commercial character,
- (c) craft activities,
- (d) the activities of the liberal professions.

Without prejudice to the provisions of the Section relating to the right of establishment, a person rendering a service may, in order to render the service, temporarily exercise his activity in the country where the service is rendered, under the same conditions as those imposed by that country on its own nationals.

ARTICLE 61

1. The free movement of services in the matter of transport shall be governed by the provisions of the Chapter relating to transport.

2. The liberalisation of banking and insurance services connected with movements of capital must be effected in harmony with the progressive liberalisation of the movement of capital.

ARTICLE 62

Member States shall not introduce any new restrictions on the freedom which has been effectively achieved, in regard to the rendering of services, at the time when the present Treaty comes into force, subject only to the provisions contained in the Treaty.

ARTICLE 63

1. Before the end of the first stage, the Council, voting unanimously on a proposal by the Commission and after consulting the Economic and Social Committee and the Assembly, shall lay down a general programme for the abolition of restrictions existing within the Community on the free rendering of services. The Commission shall submit this proposal to the Council during the first two years of the first stage.

The programme shall, for each type of service, determine the general conditions under which and the stages by which the liberalisation shall be effected.

2. For the purpose of implementing the general programme or, if no programme exists, for the purpose of completing one stage in the liberalisation of a specific service, the Council, voting unanimously before the end of the first stage and thereafter with the prescribed majority, on a proposal by the Commission and after consulting the Economic and Social Committee and the Assembly, shall issue directives.

3. The proposals and decisions referred to in paragraphs 1 and 2 relate, in general, by priority to services which directly affect production costs, or of which the liberalisation will contribute towards facilitating the exchange of goods.

ARTICLE 64

Member States declare their readiness to liberalise services beyond the extent made obligatory by the directives issued in implementation of Article 63, paragraph 2, if their general economic situation, and the situation of the sector concerned, so permits.

The Commission shall make recommendations to this effect to the Member States concerned.

ARTICLE 65

Until the abolition of restrictions on the free rendering of services is effected, each Member State shall apply them without distinction of nationality or residence to all those rendering services who are referred to in Article 59, paragraph 1.

ARTICLE 66

The provisions of Articles 55 to 58 inclusive shall be applicable to the matters governed by the present Section.

SECTION 4—CAPITAL

ARTICLE 67

1. During the transitional period and to the extent necessary to the effective operation of the common market, Member States shall progressively abolish as between themselves restrictions on the movement of capital belonging to persons resident in Member States, and also all discriminatory treatment on the grounds of the nationality or the place of residence of the parties, or of the place in which the capital is invested.

2. Current payments connected with the movement of capital between Member States shall be freed from all restrictions at latest at the end of the first stage.

ARTICLE 68

1. Member States shall authorise exchange transactions on the most liberal scale possible, in connection with the matters referred to in the present Section, so far as such authorisations are still necessary after the entry into force of the Treaty.

2. When a Member State applies its internal regulations governing the capital market and credit to the movement of capital freed in accordance with the provisions of the present Section, it shall do so without discrimination.

3. Loans intended for the direct or indirect financing of a Member State or of municipal authorities within its territory may not be issued or placed in other Member States except when the States concerned have agreed thereto. This provision shall not obstruct the implementation of Article 22 of the Protocol relating to the Statutes of the European Investment Bank.

ARTICLE 69

The Council, voting unanimously during the first two stages and thereafter with the prescribed majority, on a proposal by the Commission, which for this purpose shall consult the Monetary Committee provided for in Article 105, shall issue the necessary directives for the progressive implementation of the provisions of Article 67.

ARTICLE 70

1. The Commission shall propose to the Council suitable measures for the progressive co-ordination of the exchange policies of Member States in regard to the movement of capital between those States and outside countries. The Council, voting unanimously, shall issue directives on this subject, and shall endeavour to achieve the maximum degree of liberalisation possible.

2. If the action taken to implement the foregoing paragraph should not permit of the abolition of discrepancies between the exchange regulations of Member States, and if these discrepancies should lead persons resident in one of the Member States to make use of the transfer facilities within the Community, as provided for under Article 67, in order to evade the regulations of one of the Member States vis-a-vis third countries, that State may, after consulting the other Member States and the Commission, take appropriate measures to overcome these difficulties.

If the Council establishes that such measures restrict the free movement of capital within the Community beyond what is necessary for the purposes of the preceding sub-paragraph, it may decide, voting with the prescribed majority on a proposal by the Commission, that the State concerned must modify or abolish these measures.

ARTICLE 71

Member States shall endeavour to avoid introducing within the Community any new exchange restrictions affecting the movement of capital and current payments connected with such movement, or increasing the severity of existing regulations.

They declare their readiness to go beyond the degree of liberalisation of capital provided for in the preceding Articles so far as their economic situation, and in particular the state of their balance of payments, permits.

The Commission, after consulting the Monetary Committee, may make recommendations to Member States on this subject.

ARTICLE 72

Member States shall keep the Commission informed of all capital movements of which they are aware to and from outside countries. The Commission may address to Member States any comments it deems appropriate on this subject.

ARTICLE 73

1. Should movements of capital lead to disturbance of the operations of the capital market in any Member State, the Commission, after consulting the Monetary Committee, shall authorise such State to take protective measures with regard to the movement of capital, and shall determine the conditions and methods of their implementation.

The Council, voting with the prescribed majority, may withdraw this authorisation, or modify the aforementioned conditions and methods of implementation.

2. Nevertheless, the Member State which is in difficulties may itself take the above-mentioned measures, on the ground of their secret or urgent character, should they be necessary. The Commission and the other Member States must be informed of these measures at latest at the time when they enter into force. In such case, the Commission, after consulting the Monetary Committee, may decide that the State concerned must modify or abolish the measures in question.

CHAPTER IV

Transport

ARTICLE 74

With regard to matters covered by the present Chapter, Member States shall pursue the aims of the Treaty within the framework of a common transport policy.

ARTICLE 75

1. For the purpose of implementing Article 74 and with due regard to special transport considerations, the Council, voting unanimously until the end of the second stage and thereafter with the prescribed majority shall, on the proposal of the Commission and after consulting the Economic and Social Committee and the Assembly, lay down

(a) common rules applicable to international transport effected from or to the territory of a Member State or in transit through the territory of one or more Member States,

(b) conditions for the admission of non-resident carriers to national transport services within a Member State,

(c) any other appropriate provisions.

2. The provisions referred to in (a) and (b) of the preceding paragraph shall be laid down during the transitional period.

3. In derogation of the procedure provided for in paragraph 1, provisions relating to the principles of the transport regime, the application of which might seriously affect the standard of living and level of employment in certain regions, and also the use made of transport equipment shall, with due regard to the need for adaptation to economic expansion resulting from the establishment of the common market, be drawn up by a unanimous vote of the Council.

ARTICLE 76

Until the provisions referred to in Article 75, paragraph 1 are drawn up, and unless the Council gives its unanimous consent, no Member State shall apply the various transport provisions governing the matter at the time when the present Treaty enters into force in such a way as to make them less favourable, in their direct or indirect effect, for carriers of other Member States by comparison with its own national carriers.

ARTICLE 77

Measures of aid to meet the needs of transport coordination, or corresponding to repayments in respect of certain burdens inherent in the notion of a public service, shall be compatible with the present Treaty.

ARTICLE 78

Any measures relating to transport rates and conditions, adopted within the framework of the present Treaty, shall pay due regard to the economic situation of carriers.

ARTICLE 79

1. All discriminations which consist in the application by a carrier in respect of the same goods conveyed by the same routes, of transport charges and conditions that differ on the ground of the country of origin or destination of the goods carried, shall be abolished in traffic within the Community at latest before the end of the second stage.

2. Paragraph 1 shall not preclude the adoption of other measures by the Council in application of Article 75, paragraph 1.

3. The Council, voting with the prescribed majority on a proposal of the Commission and after consulting the Economic and Social Committee, shall, within two years of the entry into force of the present Treaty, draw up regulations for the implementation of the provisions of paragraph 1.

The Council may, in particular, take the measures necessary to enable the institutions of the Community to ensure that the rule laid down in paragraph 1 is observed and that all the advantages accruing from it are enjoyed by users.

4. The Commission shall, on its own initiative or at the request of a Member State, examine the cases of discrimination referred to in para-

graph 1 and, after consulting the Member States concerned, shall take the necessary decisions under the regulations drawn up in accordance with the provisions of paragraph 3.

ARTICLE 80

1. In respect of transport effected within the Community, the imposed application of rates and conditions involving any element of support or protection for the benefit of one or more particular undertakings or industries shall be prohibited as from the beginning of the second stage, unless authorised by the Commission.

2. The Commission shall, on its own initiative or at the request of a Member State, examine the rates and conditions referred to in paragraph 1, with particular regard, on the one hand, to the demands of a suitable regional economic policy, the needs of under-developed regions, and the problems of regions seriously affected by political conditions and, on the other hand, to the effects of such rates and conditions on competition between the different forms of transport.

After consulting any Member State concerned, the Commission shall take the necessary decisions.

3. The prohibition referred to in paragraph 1 shall not apply to competitive tariffs.

ARTICLE 81

Charges or dues collected by a carrier, in addition to the transport rates, for carriage across frontiers, must not exceed a reasonable level, due regard being had to the real costs of such carriage.

Member States shall endeavour progressively to reduce these costs.

The Commission may make recommendations to Member States for the implementation of the present Article.

ARTICLE 82

The provisions of the present Chapter shall not debar the measures adopted in the German Federal Republic, so far as these are necessary to compensate for the economic disadvantages entailed, by the division of Germany, for the economy of certain regions of the Federal Republic affected by that division.

ARTICLE 83

A Committee of a consultative character, composed of experts appointed by the Governments of Member States, shall be set up and attached to the Commission, which shall consult it on transport questions whenever it deems it advisable, without prejudice to the competence of the transport section of the Economic and Social Committee.

ARTICLE 84

1. The provisions of the present Chapter shall apply to transport by rail, road and navigable waterway.

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2. The Council, voting unanimously, may decide whether, to what extent and by what procedure, appropriate provisions can be adopted for sea and air traffic.

PART THREE. POLICY OF THE COMMUNITY

CHAPTER I

Common Rules

SECTION 1—RULES GOVERNING COMPETITION

SUB-SECTION 1 : *Rules applying to firms*

ARTICLE 85

1. The following shall be considered as incompatible with the common market and shall be prohibited: all agreements between firms, all decisions for mergers between firms and all concerted practices, likely to affect trade between Member States and having as their object or result the prevention, restriction or distortion of the free play of competition within the common market, in particular those entailing:

(a) the direct or indirect establishment of cost prices or sale prices, or of any other terms of business;

(b) the limitation or control of production, markets, technical development or investment;

(c) market-sharing or the sharing of sources of supply;

(d) the application to parties to transactions of different terms in respect of similar supplies, thereby placing them at a disadvantage in regard to competition;

(e) the subjection of the conclusion of a contract to the acceptance, by the other party, of additional supplies of goods which, either by their nature or according to commercial usage, have no connection with the goods covered by such contract.

2. Any agreements or decisions prohibited under the provisions of the present Article shall be automatically null and void.

3. Nevertheless, the provisions of paragraph 1 above may be declared inapplicable in the case of any of the following, namely:

agreements or categories of agreements between firms;

decisions for mergers or categories of decisions for mergers;

concerted practices or categories of concerted practices

which contribute to improve the production or distribution of goods, or to promote technical or economic progress whilst, at the same time, ensuring that consumers have a fair share in the benefits resulting therefrom, but which do not

(a) impose on the firms concerned any restrictions that are not essential to the attainment of the above objectives; or

(b) enable such firms to eliminate competition in respect of a substantial proportion of the goods in question.

ARTICLE 86

To the extent to which trade between Member States may be affected thereby, action by one or more firms to take unfair advantage of their dominant position within the common market, or within a substantial part of it, shall be incompatible with the common market and shall be prohibited.

Examples of such unfair action are:

(a) the direct or indirect fixing of unfair cost prices or sale prices or any other unfair terms of business;

(b) the limitation of production, markets or technical development to the prejudice of consumers;

(c) the application to parties to transactions of different terms in respect of similar supplies, thereby placing them at a disadvantage in regard to competition;

(d) the subjection of the conclusion of a contract to the acceptance, by the other party, of additional supplies of goods which, either by their nature or according to commercial usage, have no connection with the goods covered by such contract.

ARTICLE 87

1. Within three years as from the entry into force of the present Treaty, the Council, after consulting the Assembly and voting unanimously on a proposal by the Commission, shall issue any appropriate regulations or directives for the application of the principles set out in Articles 85 and 86.

If such provisions have not been adopted within the above-mentioned time-limits, they shall be laid down by the Council, voting with the prescribed majority on a proposal by the Commission and after consulting the Assembly.

2. The provisions referred to in paragraph 1 above shall be designed, in particular:

(a) to ensure observance of the prohibitions referred to in paragraph 1 of Article 85 and in Article 86, by the institution of fines or means of compulsion;

(b) to determine ways and means of applying paragraph 3 of Article 85, with due regard to the need for ensuring adequate supervision combined with the maximum possible simplification of administrative control;

(c) where necessary, to define the scope of application of the provisions contained in Articles 85 and 86 in respect of the various economic sectors;

(d) to specify the respective responsibilities of the Commission and the Court of Justice in the application of the arrangements provided for in the present paragraph;

(e) to specify the relationship of the national laws to the provisions of the present sub-section and those adopted in application of the present Article.

ARTICLE 88

Until the entry into force of the measures taken in application of Article 87, the authorities of Member States shall decide upon the admissibility

of agreements and upon questions regarding any unfair advantage that may be taken of a dominant position in the common market, according to the laws of their own countries and the provisions of Article 85, especially paragraph 3, and of Article 86.

ARTICLE 89

1. Without prejudice to the provisions of Article 88, the Commission shall, from the moment of taking up its duties, supervise the application of the principles laid down in Articles 85 and 86. At the request of a Member State, or on its own responsibility, it shall investigate, in conjunction with the competent authorities of the Member States who lend it their assistance, any presumed infringement of the aforementioned principles. If it finds that such infringement has taken place, it shall propose appropriate means for putting an end to it.

2. If such infringement continues, the Commission shall issue a reasoned decision recording the infringement of the principles. The Commission may publish its decision and may authorise Member States to take the necessary measures under conditions and in forms to be laid down by the Commission.

ARTICLE 90

1. In respect of public enterprises and undertakings to which they grant special or exclusive rights, Member States shall neither decree nor retain in force any measures contrary to the rules embodied in the present Treaty, more particularly, those laid down in Article 7 and in Articles 85 to 94 inclusive.

2. Any enterprise responsible for operating services of general economic importance or having the character of a fiscal monopoly shall be subject to the rules embodied in the present Treaty, more particularly those relating to competition, to the extent to which the application of such rules does not obstruct the *de jure* or *de facto* fulfilment of the specific tasks entrusted to such enterprise. The development of trade shall not be allowed to be affected to a degree contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of the present Article and shall, where necessary, issue appropriate directives or decisions to Member States.

SUB-SECTION 2: *Dumping practices*

ARTICLE 91

1. If, during the transitional period, the Commission, at the request of a Member State or of any other interested party, finds that dumping practices are being carried on within the common market, it shall issue recommendations to the party or parties responsible, with a view to putting an end to such practices.

Should such dumping practices continue, the Commission shall authorise the Member State injured thereby to take measures for its protection, the

conditions and methods of application of such measures being laid down by the Commission.

2. Upon the entry into force of the present Treaty, any products originating or freely available in one Member State which have been exported to another Member State shall be admitted free of all customs duties, quantitative restrictions or measures having an equivalent effect when re-imported into the territory of the first Member State. The Commission shall lay down appropriate regulations for the application of the present paragraph.

SUB-SECTION 3: *State aid*

ARTICLE 92

1. Subject to any exceptions provided for in the present Treaty, any aid, in whatever form, granted by a Member State or by means of State resources, that distorts or threatens to distort competition by favouring certain firms or certain producers shall, to the extent to which it affects trade between Member States, be incompatible with the common market.

2. The following types of aid shall be compatible with the common market:

(a) aid of a social character granted to individual consumers, provided such aid is granted without any discrimination based on the origin of the products concerned;

(b) any aid granted to remedy damage caused by natural calamities or other extraordinary events;

(c) the aid granted to the economies of certain regions of the Federal Republic of Germany affected by the partition of Germany, to the extent to which such aid is necessary in order to compensate for the economic disadvantages caused by such partition.

3. The following types of aid may be considered as compatible with the common market:

(a) aid intended to promote the economic development of regions where the standard of living is abnormally low or where there is serious under-employment;

(b) aid intended to promote the execution of large-scale projects of common European interest, or to remedy a serious disturbance in the economy of a Member State;

(c) aid intended to facilitate the development of certain activities or of certain economic regions, provided such aid does not disturb trading conditions to a degree contrary to the common interest. Nevertheless, any aid being granted to shipbuilding on 1 January 1957, to the extent to which such aid corresponds only to the absence of customs protection, shall be progressively reduced under the same conditions as apply to the abolition of customs duties, subject always to the provisions of the present Treaty relating to common commercial policy vis-a-vis outside countries;

(d) such other types of aid as may be specified by decision of the Council voting with the prescribed majority on a proposal by the Commission.

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ARTICLE 93

1. The Commission shall undertake constant review with Member States of all systems of aid existing in those States. It shall propose to the latter any appropriate measures required for the progressive development or for the operation of the common market.

2. If, after having called upon the parties concerned to submit their comments the Commission finds that a measure of aid granted by a State or by means of the resources of a State is not compatible with the common market under Article 92, or that such aid is applied in an unfair manner, it shall take a decision requiring the State concerned to abolish such aid or to modify it, within the time-limit prescribed by the Commission.

If the State concerned does not comply with this decision within the time-limit prescribed, the Commission or any other State concerned may submit the matter direct to the Court of Justice notwithstanding the provisions of Articles 169 and 170.

At the request of any Member State, the Council may decide, by a unanimous vote, that a measure of aid granted or about to be granted by that State shall be considered as compatible with the common market, notwithstanding the provisions of Article 92 or the regulations provided for in Article 94, if such a decision is justified by exceptional circumstances. If the Commission has already initiated the procedure provided for in the first sub-paragraph of the present paragraph, with regard to the aid in question, the request made to the Council by the State concerned shall entail the suspension of such procedure until the Council shall have determined its attitude.

Nevertheless, if the Council has not made its attitude known within three months of such request, a decision shall be taken by the Commission.

3. The Commission shall be informed, in time to submit its observations, of any plans to grant or to modify aid. If it considers that any such plan is not compatible with the common market under the terms of Article 92, it shall without delay initiate the procedure provided for in the preceding paragraph. The Member State concerned may not put its proposed plans into operation before such procedure shall have resulted in a final decision.

ARTICLE 94

The Council, voting with the prescribed majority on a proposal by the Commission, may make any appropriate regulations for the application of Articles 92 and 93 and may, in particular, determine the conditions of application of paragraph 3 of Article 93 and the types of aid which are exempted from this procedure.

SECTION 2—FISCAL PROVISIONS

ARTICLE 95

No Member State shall levy, directly or indirectly on the products of other Member States any internal taxes, of any description, higher than those levied directly or indirectly on similar national products.

Furthermore, no Member State shall levy on the products of other Member States any internal taxes of such a nature as to give indirect protection to the production of other goods.

By, at latest, the beginning of the second stage, Member States shall abolish or amend any provisions existing at the time of the entry into force of the present Treaty which are contrary to the above rules.

ARTICLE 96

Products exported to the territory of any Member State may not benefit from any refund of internal taxes higher than the taxes that have been imposed, directly or indirectly, on them.

ARTICLE 97

Any Member States which levy a turnover tax calculated by a cumulative multi-stage system may, in the case of internal taxes that they levy on imported products and of tax refunds that they grant on exported products, establish average rates for specific products or groups of products, provided they do not infringe the principles laid down in Articles 95 and 96.

Should the average rates established by a Member State not conform to the aforementioned principles, the Commission shall issue to the State concerned such directives or decisions as are appropriate.

ARTICLE 98

With regard to taxes other than turnover taxes, excise duties and other measures of indirect taxation, exemptions and refunds in respect of exports to other Member States may not be granted, and compensatory taxes on imports from other Member States may not be imposed, except in so far as the measures contemplated have been previously approved for a limited period by the Council, voting with the prescribed majority on a proposal by the Commission.

ARTICLE 99

The Commission shall consider in what way the laws of the various Member States concerning turnover taxes, excise duties and other indirect taxes, including compensatory measures applied in respect of trade between Member States, can be harmonised in the interests of the common market.

The Commission shall submit proposals to the Council, which shall decide by a unanimous vote, without prejudice to the provisions of Articles 100 and 101.

SECTION 3—HARMONISATION OF LAWS

ARTICLE 100

The Council, voting unanimously on a proposal by the Commission, shall issue directives for the harmonisation of such laws, regulations and administrative rules of the Member States as directly affect the establishment or operation of the common market.

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The Assembly and the Economic and Social Committee shall be consulted in the case of any directives the implementation of which would involve amendment of the laws in one or more of the Member States.

ARTICLE 101

Should the Commission find that differences existing between the laws, regulations or administrative rules of the Member States interfere with the conditions of competition on the common market, and thereby bring about a lack of balance that calls for correction, it shall enter into consultations with the Member States concerned.

If such consultations do not result in an agreement by which the said lack of balance is corrected, the Council, on the proposal of the Commission and by a unanimous vote during the first stage and thereafter with the prescribed majority, shall issue the requisite directives to this end. The Commission and the Council may take any other appropriate measures provided for in the present Treaty.

ARTICLE 102

1. Should there be reason to fear that the adoption or amendment of a law, regulation or administrative rule will result in a lack of balance within the meaning of the preceding Article, the Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to obviate the said lack of balance.

2. If the State desiring to adopt or amend national provisions does not comply with the recommendation made to it by the Commission, other Member States shall not be requested, under the terms of Article 101, to amend their own national provisions in order to correct such lack of balance. If the Member State which has ignored the Commission's recommendation brings about a lack of balance to its own detriment only, the provisions of Article 101 shall not apply.

CHAPTER II

Economic Policy

SECTION 1—CONJUNCTURE POLICY

ARTICLE 103

1. Member States shall consider their conjuncture or "day-to-day" policy as a question of common interest. They shall consult with each other and with the Commission on measures to be taken in the light of current circumstances.

2. Without prejudice to any other procedures for which provision is made in the present Treaty, the Council, on the proposal of the Commission, may decide unanimously on measures appropriate to the situation.

3. The Council, voting with the prescribed majority on a proposal by the Commission, shall, if necessary, issue such directives as may be re-

quired regarding ways and means of applying any measures decided upon under the terms of paragraph 2 above.

4. The procedures provided for in the present Article shall apply also in the event of difficulties arising in connection with the supply of certain products.

SECTION 2—BALANCE OF PAYMENTS

ARTICLE 104

Each Member State shall pursue the economic policy necessary to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, whilst at the same time ensuring a high level of employment and the stability of price levels.

ARTICLE 105

1. In order to facilitate achievement of the objectives set out in Article 104, Member States shall co-ordinate their economic policies. They shall accordingly establish co-operation between the competent services of their administrative departments and between their central banks.

The Commission shall submit to the Council recommendations for the establishment of such co-operation.

2. In order to promote the co-ordination of the policies of Member States in monetary matters, to the full extent necessary to the operation of the common market, a Monetary Committee with consultative status shall be set up, with the following objects:

to keep under review the monetary and financial situation of Member States and of the Community, and also the general payments system of Member States, and to report regularly thereon to the Council and to the Commission,

of its own initiative, or at the request of the Council or the Commission, to formulate opinions for submission to these institutions.

The Member States and the Commission shall appoint two members of the Monetary Committee.

ARTICLE 106

1. Each Member State undertakes to authorise, in the currency of the Member State in which the creditor or the beneficiary resides, any payments concerned with the exchange of goods, services or capital, and also transfers of capital and wages, to the extent to which the movement of goods, services, capital and persons is freed as between Member States under the present Treaty.

Member States declare their readiness to free payments beyond the extent provided for in the preceding sub-paragraph, so far as their economic situation in general and the situation of their balance of payments in particular shall permit them to do so.

2. In so far as the exchange of goods and services and the movement of capital are limited only by restrictions on payments connected therewith, and for the purposes of the progressive abolition of such restric-

tions, the provisions of the Sections relating to the abolition of quantitative restrictions, the freeing of services and the free movement of capital shall apply by analogy.

3. The Member States undertake not to introduce as between themselves any new restrictions on transfers connected with the invisible transactions listed in Annex III to the present Treaty.*

The progressive abolition of existing restrictions shall be effected in accordance with the provisions of Articles 63 to 65 inclusive, to the extent to which such abolition is not governed by the provisions contained in paragraphs 1 and 2 above or by the Section relating to the free movement of capital.

4. Should it prove necessary, Member States shall concert together concerning the measures to be taken to enable the payments and transfers mentioned in the present Article to be effected. These measures must not be incompatible with the objectives laid down in the present Section.

ARTICLE 107

1. Each Member State shall treat its policy with regard to exchange rates as a problem of common interest.

2. Should a Member State make any alteration in its exchange rate which is incompatible with the objectives laid down in Article 104 and which seriously interferes with conditions of competition, the Commission, after consulting the Monetary Committee, may authorise other Member States to take, for a strictly limited period, the measures necessary to deal with the consequences of such alteration, the conditions and methods of application of such measures being laid down by the Commission.

ARTICLE 108

1. Should a Member State be faced with difficulties or with a serious threat of difficulties in the matter of its balance of payments, as a result either of overall disequilibrium of the balance of payments or of the character of the currencies at its disposal, and if such difficulties are likely, in particular, to jeopardise the operation of the common market or the progressive establishment of common commercial policy, the Commission shall without delay proceed to examine the situation of the State concerned and the action that it has taken or may take in accordance with the provisions of Article 104, with resort to all the means at its disposal. The Commission shall state the measures of which it recommends the adoption by the State concerned.

If the action undertaken by a Member State and the measures suggested by the Commission do not appear sufficient to overcome the difficulties encountered or threatened, the Commission, after consulting the Monetary Committee, shall recommend to the Council the grant of mutual aid and the appropriate methods therefor.

The Commission shall keep the Council regularly informed of the situation and of its development.

* Printed below, p. 937.

2. The Council, voting with the prescribed majority, shall grant mutual aid and shall issue directives or decisions laying down the conditions and methods of application thereof. Mutual aid may take the form in particular, of:

(a) concerted action directed towards other international organisations to which Member States can resort;

(b) any measures necessary to prevent diversions in the current of trade if the State in difficulties maintains or reestablishes quantitative restrictions with regard to outside countries;

(c) the granting, subject to their agreement, of limited credits by other Member States.

Furthermore, during the transitional period, mutual aid may also take the form of special reductions in customs duties or increases in quotas, for the purpose of facilitating increased imports from the State in difficulties, subject to the agreement of the States by which such measures would be taken.

3. If the mutual aid recommended by the Commission is not granted by the Council, or if the mutual aid granted and the measures taken prove insufficient, the Commission shall authorise the State in difficulties to take measures of protection, of which the Commission shall lay down the conditions and methods of application.

Such authorisation may be withdrawn or the conditions and methods of application amended by the Council, voting with the prescribed majority.

ARTICLE 109

1. In the event of a sudden crisis in the balance of payments and if a decision, as provided for in paragraph 2 of Article 108, is not taken immediately, the Member State concerned may take, as conservatory measures, the measures necessary for its protection. Such measures shall involve the least possible disturbance to the operation of the common market and shall not go beyond what is strictly indispensable in order to remedy the sudden difficulties that have arisen.

2. The Commission and the other Member States shall be informed of such measures of protection, at latest at the moment of their entry into force. The Commission may recommend to the Council mutual aid under the terms of Article 108.

3. On being advised by the Commission and after consulting the Monetary Committee, the Council, voting with the prescribed majority, may decide that the State concerned must amend, suspend or abolish the measures of protection referred to above.

SECTION 3—COMMERCIAL POLICY

ARTICLE 110

By establishing a customs union between themselves, Member States intend to contribute in conformity with the common interest to the harmoni-

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ous development of world trade, the progressive abolition of restrictions on international trade and the lowering of tariff barriers.

The common commercial policy shall take into account the favourable effect that the abolition of customs duties as between Member States may have on the development of the competitive strength of the enterprises of those States.

ARTICLE 111

During the transitional period, and without prejudice to the provisions of Articles 115 and 116, the following provisions shall apply:

1. Member States shall take steps to co-ordinate their trade relations with outside countries in such a way as to bring about, by the end of the transitional period, the conditions necessary to the implementation of a common policy in the matter of external trade.

The Commission shall submit proposals to the Council regarding the procedure to be followed during the transitional period, for the pursuit of common action and the achievement of a uniform commercial policy.

2. The Commission shall submit to the Council recommendations with a view to tariff negotiations with outside countries concerning the common customs tariff.

The Council shall authorise the Commission to open such negotiations.

The Commission shall conduct these negotiations in consultation with a Special Committee appointed by the Council to assist it in this task within the limits of such directives as the Council may issue to it.

3. When exercising the powers conferred on it under the present Article, the Council shall take its decisions by unanimous vote during the first two stages and thereafter by the prescribed majority.

4. Member States, in consultation with the Commission, shall take all necessary measures with the object, more especially, of adjusting all tariff agreements in force with outside countries so that the entry into force of the common customs tariff may not be delayed.

5. Member States shall aim at securing uniformity between themselves at as high a level as possible in their lists concerning freedom of trade with outside countries or groups of outside countries. The Commission shall make any appropriate recommendations to Member States for this purpose.

If Member States take steps to abolish or reduce quantitative restrictions vis-a-vis outside countries, they shall inform the Commission beforehand and shall accord identical treatment to other Member States.

ARTICLE 112

1. Without prejudice to obligations assumed by Member States as members of other international organisations, any measures that they take to assist exports to outside countries shall be progressively harmonised before the end of the transitional period, to the extent necessary to ensure that competition between enterprises in the Community shall not be adversely affected.

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On the proposal of the Commission, the Council, voting unanimously until the end of the second stage and thereafter with the prescribed majority, shall issue the directives necessary to this end.

2. The foregoing provisions shall not apply to drawbacks on customs duties or taxes with equivalent effect, nor to refunds of indirect taxes including turnover taxes, excise duties and other indirect taxes, accorded in connection with exports of goods from a Member State to an outside country, in so far as such drawbacks or refunds do not exceed the taxes or duties that have been levied, directly or indirectly, on the products exported.

ARTICLE 113

1. After the end of the transitional period, the common commercial policy shall be based on uniform principles, especially with regard to tariff amendments, the conclusion of tariff or trade agreements, the standardisation of measures of liberalisation, export policy and measures for the defense of trade including those to be taken in cases of dumping or subsidies.

2. The Commission shall submit proposals to the Council for the putting into effect of this common commercial policy.

3. Should agreements with outside countries require to be negotiated, the Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations.

Such negotiations shall be conducted by the Commission in consultation with a special committee appointed by the Council to assist it in this task, and within the limits of such directives as the Council may issue to it.

4. When exercising the powers conferred upon it by the present Article, the Council shall take its decision by the prescribed majority.

ARTICLE 114

The agreements referred to in paragraph 2 of Article 111 and in Article 113 shall be concluded on behalf of the Community by the Council, acting unanimously during the first two stages and thereafter with the prescribed majority.

ARTICLE 115

In order to ensure that the execution of measures of commercial policy taken by any Member State in accordance with the present Treaty shall not be hindered by diversions of the current of trade or in the event of disparities between such measures leading to economic difficulties in one or more of the Member States, the Commission shall recommend the methods whereby the other Member States shall provide the necessary co-operation. Failing this, the Commission shall authorise the Member States to take the necessary measures of protection, the conditions and methods of application thereof being laid down by the Commission.

In urgent cases and during the transitional period, Member States may themselves take such measures as are necessary and notify them to the other Member States, and also to the Commission, which may decide that they must amend or withdraw them.

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In choosing such measures, priority must be given to those which cause the least disturbance to the operation of the common market and which take due account of the necessity for hastening, so far as possible, the establishment of the common customs tariff.

ARTICLE 116

With regard to all questions of special importance to the common market, Member States shall not, as from the end of the transitional period, take any but common action within the framework of any international organisations of an economic character. The Commission shall submit proposals concerning the scope and implementation of such common action of the Council, which shall take its decision by the prescribed majority.

During the transitional period, Member States shall consult with each other with a view to concerting their action and, so far as possible, adopting a uniform attitude.

CHAPTER III

Social Policy

SECTION 1—SOCIAL PROVISIONS

ARTICLE 117

Member States are agreed upon the need to foster the improvement of the living and working conditions of the labour force so as to make it possible to equalise those conditions at increasingly high levels.

They consider that such a development will follow alike from the operation of the common market, which will favour the harmonisation of social systems, and from the procedure provided for under the present Treaty and the assimilation of laws, regulations and administrative rules.

ARTICLE 118

Without prejudice to the other provisions of the present Treaty, and in conformity with its general aims, the task of the Commission shall be to foster close collaboration between Member States in the social field, particularly in matters relating to

- (a) employment,
- (b) labour laws and working conditions,
- (c) preliminary and advanced vocational training,
- (d) social welfare,
- (e) safety measures against occupational accidents and diseases,
- (f) industrial hygiene,
- (g) trade-union laws and collective bargaining between employers and workers.

For this purpose, the Commission shall act in close contact with Member States through investigations, the giving of opinions, and the organising of consultations both on problems arising at the national level and on those of concern to international organisations.

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Before giving the opinions provided for under the present Article, the Commission shall consult the Economic and Social Committee.

ARTICLE 119

Each Member State shall ensure that the principle of equal pay for equal work as between male and female workers is applied during the first stage and is maintained thereafter.

For the purposes of the present Article, pay shall be understood as the ordinary basic or minimum wage or salary and any other benefits paid directly or indirectly, in money or in kind, by the employer to the worker in return for his services.

Equal pay without discrimination between the sexes means that:

(a) pay for the same work at piece-rates shall be calculated on the basis of the same unit of measurement,

(b) pay for work at time-rates shall be the same for the same job.

ARTICLE 120

Member States shall endeavour to maintain the existing equivalence of paid holiday schemes.

ARTICLE 121

The Council, voting unanimously after consulting the Economic and Social Committee, may entrust the Commission with functions relating to the implementation of common measures, particularly as regards the social welfare of the migrant workers referred to in Articles 48 to 51 inclusive.

ARTICLE 122

In its annual report to the Assembly, the Commission shall devote a special chapter to the evolution of the social situation in the Community.

The Assembly may request the Commission to draw up reports on special problems concerning the social situation.

SECTION 2—THE EUROPEAN SOCIAL FUND

ARTICLE 123

In order to increase opportunities for the employment of workers in the common market and thus contribute to raising the standard of living, a European Social Fund shall be created within the framework of the provisions set out below, for the purpose of promoting employment facilities and the geographical and occupational mobility of workers within the Community.

ARTICLE 124

The Commission shall be responsible for the administration of the Fund.

The Commission shall be assisted in this task by a Committee presided over by a member of the Commission and consisting of representatives of Governments, trade unions and employers' associations.

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ARTICLE 125

1. At the request of a Member State, the Fund shall, within the framework of the regulations provided for under Article 127, cover 50% of expenditure by that State or by a public body as from the date of the entry into force of the present Treaty:

(a) on ensuring productive re-employment of workers by means of occupational rehabilitation, resettlement allowances.

(b) on granting assistance to workers who are temporarily working on short-time or wholly or partly suspended as a result of the conversion of their firm to different work, so that they may continue to receive the same rate of pay pending their full-time re-employment.

2. The assistance granted by the Fund to the cost of occupational rehabilitation shall be conditional upon the impossibility of employing the workers rendered idle except in a new occupation, and upon their having found productive employment for at least six months in the occupation for which they have been rehabilitated.

The assistance granted in respect of resettlement allowances shall be conditional upon the unemployed workers having been obliged to change their domicile within the Community and upon their having found productive employment for at least six months in their new place of residence.

The assistance given in favour of workers in cases where a firm is converted shall be subject to the following conditions:

(a) the workers in question must have been re-engaged on full-time work in that firm for at least six months,

(b) the Government concerned must have previously submitted a plan, drawn up by the firm in question, for its conversion and for the financing thereof, and

(c) the Commission must have given its prior approval to the conversion plan.

ARTICLE 126

At the expiry of the transitional period, the Council, on being advised by the Commission and after consulting the Economic and Social Committee and the Assembly, may

(a) voting with the prescribed majority, decide that all or part of the assistance referred to in Article 125 shall no longer be granted;

(b) voting unanimously, determine the new tasks that may be entrusted to the Fund within the terms of its mandate as defined in Article 123.

ARTICLE 127

On the proposal of the Commission and after consulting the Economic and Social Committee and the Assembly, the Council, voting with the prescribed majority, shall lay down the regulations necessary for the implementation of Articles 124 to 126 inclusive; in particular, it shall fix details concerning the conditions under which the Fund shall grant assistance

under Article 125, and also the categories of firms whose workers shall receive the assistance provided for in Article 125, paragraph 1(b).

ARTICLE 128

On the proposal of the Commission and after consulting the Economic and Social Committee, the Council shall establish general principles for the implementation of a common policy of vocational training capable of contributing to the harmonious development both of national economies and of the common market.

CHAPTER IV

The European Investment Bank

ARTICLE 129

There shall be set up a European Investment Bank having legal personality.

The members of the European Investment Bank shall be the Member States.

The Statute of the European Investment Bank shall form the subject of a Protocol annexed to the present Treaty.*

ARTICLE 130

The task of the European Investment Bank shall be to contribute to the balance and smooth development of the common market in the interests of the Community through recourse to the capital markets and its own resources. For this purpose, it shall, by means of loans and guarantees, on a non-profit-making basis, facilitate the financing of the following projects in all sectors of the economy:

- (a) projects for developing under-developed regions,
- (b) projects for modernising or converting enterprises, or for creating new activities which are called for by the progressive establishment of the common market and which by their size or nature cannot be entirely covered by the various methods of financing in existence in each of the Member States,
- (c) projects of common interest to several Member States which by their size or nature cannot be entirely covered by the various methods of financing in existence in each of the Member States.

PART IV. THE ASSOCIATION OF OVERSEAS COUNTRIES AND TERRITORIES

ARTICLE 131

The Member States agree to associate with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands. These countries and territories, hereinafter called "the countries and territories" are listed in Annex IV * to the present Treaty.

The purpose of this association shall be to promote the economic and so-

* Printed below, p. 939.

cial development of the countries and territories and to establish close economic relations between them and the Community as a whole.

In conformity with the principles enunciated in the Preamble to the present Treaty, this association must in the first place permit of furthering the interests and prosperity of the inhabitants of these countries and territories so as to bring them to the economic, cultural and social development they expect.

ARTICLE 132

The objectives of the association shall be as follows:

1. In their trade with the countries and territories Member States shall apply the same conditions as they accord each other by virtue of the present Treaty.

2. Each country or territory shall apply to its trade with Member States and with the other countries and territories, the conditions which it applies to the European State with which it has special relations.

3. Member States shall contribute to the investments required for the progressive development of these countries and territories.

4. As regards investment financed by the Community, participation in tenders and supplies shall be open, on equal terms, to all individuals and legal persons, nationals of Member States or of the countries and territories.

5. In relations between Member States and the countries and territories, the right of establishment of nationals and companies shall be regulated in accordance with the provisions and by application of the procedures laid down in the Section relating to the right of establishment, and on a non-discriminatory basis, subject to the special measures taken under Article 136.

ARTICLE 133

1. Goods originating in the countries and territories shall on importation into Member States benefit by the total abolition of customs duties, which is progressively to take place between Member States in conformity with the provisions of the present Treaty.

2. Customs duties on imports from Member States and from other countries and territories on entry into any country or territory shall be progressively abolished in conformity with the provisions of Articles 12, 13, 14, 15 and 17.

3. Nevertheless, countries and territories may collect customs duties to meet the needs of their development and the requirements of their industrialisation, or duties of a fiscal nature the purpose of which is to contribute to their budget.

The customs duties referred to in the foregoing sub-paragraph shall, however, be progressively reduced to the level of those imposed on importation of products coming from the Member State with which each country or territory has special relations. The percentages and the timing of the reductions provided for under the present Treaty shall apply to the gap between the duty imposed on entry into the importing country or territory on a product coming from the Member State which has special relations with

the country or territory concerned and the duty imposed on the same product coming from the Community.

4. Paragraph 2 shall not apply to countries and territories which by reason of special international obligations by which they are bound, are already applying a non-discriminatory customs tariff at the time when the present Treaty comes into force.

5. The establishment or amendment of duties levied on goods imported into the countries and territories must not result, *de jure* or *de facto*, in any direct or indirect discrimination between imports coming from the various Member States.

ARTICLE 134

If the level of the duties applicable to goods coming from an outside country on entry into a country or territory is likely, having regard to the application of the provisions of Article 133, paragraph 1, to result in the diversion of trade to the detriment of any Member State, the latter may ask the Commission to propose to other Member States the measures necessary to remedy the situation.

ARTICLE 135

Subject to the provisions relating to public health, public safety and public order, the free movement of workers from the countries and territories in Member States, and of workers from Member States in the countries and territories, shall be governed by subsequent conventions which shall require unanimity among Member States.

ARTICLE 136

For a first period of five years as from the entry into force of the present Treaty an application Convention annexed to this Treaty* shall determine details of method and procedure concerning the association of the countries and territories with the Community.

Before the expiry of the Convention provided for in the foregoing subparagraph, the Council, voting unanimously, shall, in the light of the results achieved, and on the basis of the principles embodied in the present Treaty, determine the arrangements to be made for a further period.

PART V. ORGANS OF THE COMMUNITY

CHAPTER I

Provisions Governing Institutions

SECTION 1—ORGANS

SUB-SECTION I: *The Assembly*

ARTICLE 137

The Assembly shall be composed of representatives of the peoples of the States forming the Community and shall enjoy the powers of decision and supervision conferred upon it by the present Treaty.

* Printed below, p. 950.

ARTICLE 138

1. The Assembly shall be composed of delegates whom the parliaments shall be called upon to appoint from among their own members in accordance with the procedure laid down by each Member State.

2. The number of these delegates shall be fixed as follows :

Belgium	14
France	36
Germany	36
Italy	36
Luxembourg	6
Netherlands	14

3. The Assembly shall draw up proposals for election by direct universal suffrage according to an identical procedure in all Member States.

The Council shall, by a unanimous vote, determine the provisions which it shall recommend for adoption by Member States in accordance with their respective constitutional rules.

ARTICLE 139

The Assembly shall hold annual sessions. It shall meet as of right on the third Tuesday in October.

At the request of a majority of its members, or at the request of the Council or of the Commission, the Assembly may meet in extraordinary session.

ARTICLE 140

The Assembly shall appoint its President and its officers from among its members.

Members of the Commission may attend all meetings and shall be heard, at their own request, on behalf of the Commission.

The Commission shall reply verbally or in writing to questions put to it by the Assembly or its members.

The Council shall be heard by the Assembly under the conditions which the former lays down in its Rules of Procedure.

ARTICLE 141

Except where otherwise provided in the present Treaty, the Assembly shall take its decisions by an absolute majority of the votes cast.

The size of the quorum shall be laid down in the Rules of Procedure.

ARTICLE 142

The Assembly shall adopt its own Rules of Procedure by the vote of a majority of its members.

The decisions of the Assembly shall be published in accordance with the provisions of the Rules of Procedure.

ARTICLE 143

The Assembly shall discuss in public meeting the Annual General Report which shall be submitted to it by the Commission.

ARTICLE 144

If a motion of censure concerning the operations of the Commission is tabled in the Assembly, the latter may decide thereon, by an open vote, only after not less than three days have elapsed from the tabling of the motion.

If the motion of censure is adopted by a two-thirds majority of the votes cast, representing a majority of the members of the Assembly, the members of the Commission shall resign their office in a body. They shall continue to deal with current business until they shall have been replaced in accordance with the provisions of Article 158.

SUB-SECTION II: *The Council*

ARTICLE 145

With a view to ensuring achievement of the objectives laid down in the present Treaty, and under the conditions provided for therein, the Council shall

be responsible for co-ordinating the general economic policies of Member States;
exercise powers of decision.

ARTICLE 146

The Council shall be composed of representatives of Member States, each Government appointing to it one of its Members.

Each of the members of the Council shall act as Chairman for a period of six months in rotation, following the alphabetical order of the Member States.

ARTICLE 147

Meetings of the Council shall be called by the Chairman, on his own initiative, or at the request of one of its members or of the Commission.

ARTICLE 148

1. Except where otherwise provided in the present Treaty, decisions of the Council shall be taken by a majority of its members.

2. In the case of Council decisions requiring a prescribed majority the votes of its members shall be weighted as follows:

Belgium	2
France	4
Germany	4
Italy	4
Luxembourg	1
• Netherlands	2

Decisions receiving at least the following number of votes shall be regarded as adopted:

in the case of decisions which the present Treaty requires to be taken on a proposal by the Commission: twelve votes;

in other cases: twelve votes representing a favourable vote by at least four members.

3. Abstentions by members either present in person or represented shall not prevent the adoption of Council decisions requiring unanimity.

ARTICLE 149

When the present Treaty requires that a Council decision be taken on a proposal by the Commission, the Council may amend such proposal only by a unanimous vote.

So long as the Council has not taken its decision, the Commission may amend its original proposal, in particular, in cases where the Assembly has been consulted on the proposal in question.

ARTICLE 150

When a vote is taken, each member of the Council may act as proxy for not more than one other member.

ARTICLE 151

The Council shall draw up its own Rules of Procedure.

The Rules of Procedure may provide for the establishment of a Committee composed of representatives of Member States. The terms of reference and powers of such Committee shall be determined by the Council.

ARTICLE 152

The Council may request the Commission to undertake any studies which it considers desirable with a view to achieving the common objectives, and to submit to it any suitable proposals.

ARTICLE 153

After taking the opinion of the Commission, the Council shall lay down the Statutes of the Committees provided for in the present Treaty.

ARTICLE 154

The Council, voting with the prescribed majority, shall determine the salaries, allowances and pensions to be paid to the Chairman and members of the Commission, and to the President, judges, advocates-general and Registrar of the Court of Justice. It shall also determine, by a similar majority, the amount of any allowances to be granted in lieu of remuneration.

SUB-SECTION III: *The Commission*

ARTICLE 155

With a view to ensuring the operation and development of the common market, the Commission shall

supervise the application of the provisions of the present Treaty and of measures adopted by the organs of the Community in virtue thereof; formulate recommendations or opinions in regard to matters covered by the present Treaty, in cases where this is explicitly provided therein or where the Commission considers it necessary;

enjoy independent powers of decision and take part in the preparation of decisions by the Council and Assembly, under the conditions laid down in the present Treaty;

exercise the powers conferred on it by the Council with a view to the execution of the rules laid down by the latter.

ARTICLE 156

The Commission shall each year, at least one month before the opening of the Assembly Session, issue a General Report on the work of the Community.

ARTICLE 157

1. The Commission shall be composed of nine members, selected for their general competence and of unquestioned integrity.

The number of members of the Commission may be altered by a unanimous vote of the Council.

Members of the Commission must be nationals of Member States.

The Commission may not include more than two members who are nationals of the same State.

2. The members of the Commission shall carry out their functions in complete independence, in the general interest of the Community.

In the discharge of their duties they shall neither ask for nor accept instructions from any Government or other body and shall refrain from all action incompatible with the character of their functions. Each Member State shall undertake to respect this character and not to seek to influence the members of the Commission in the performance of their task.

During their term of office the members of the Commission may not engage in any other professional activity, whether paid or unpaid. When entering upon their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations resulting therefrom and in particular the duty of exercising honesty and discretion as regards the acceptance, after their term of office, of certain functions or advantages. Should these obligations not be respected, the Court of Justice, on the application of the Council or of the Commission, may, according to circumstances, decree that the member in question either be removed from office under the provisions of Article 160, or forfeit his right to a pension or other advantages in lieu thereof.

ARTICLE 158

The members of the Commission shall be appointed by agreement between the Governments of Member States.

They shall be appointed for a term of four years and shall be re-eligible.

ARTICLE 159

Apart from retirements in regular rotation and the case of death, the appointment of any member of the Commission shall be terminable by voluntary resignation or removal from office.

Vacancies thus caused shall be filled for the term of office remaining. The Council may however decide by a unanimous vote that it is unnecessary to fill such vacancies.

Except in the case of removal from office referred to in Article 160, members of the Commission shall remain in office until a successor has been appointed.

ARTICLE 160

If any member of the Commission no longer fulfils the conditions required for the exercise of his functions, or if he commits a serious offense, he may be removed from office by decision of the Court of Justice, on petition by the Council or the Commission.

In such a case the Council may, by a unanimous vote, temporarily suspend the member from his functions and replace him, pending the decision of the Court of Justice.

The Court of Justice may temporarily suspend the member from his functions, on petition of the Council or the Commission.

ARTICLE 161

The Chairman and the two Vice-Chairmen of the Commission shall be appointed from among the members of the latter for two years, following the same procedure as that laid down for the appointment of members of the Commission. They shall be re-eligible.

Except in the case of a complete change of membership, the appointment shall be made after consultation with the Commission.

In the event of the resignation or death of the Chairman or Vice-Chairmen, they shall be replaced for the remainder of their term of office, according to the procedure laid down in the first sub-paragraph.

ARTICLE 162

The Council and the Commission shall consult with each other and reach agreement concerning the ways and means by which they shall co-operate.

The Commission shall draw up its own Rules of Procedure for the purpose of ensuring its own operation and that of its services in accordance with the provisions of the present Treaty. It shall be responsible for publishing its Rules of Procedure.

ARTICLE 163

Decisions of the Commission shall be taken by a majority of the members provided for in Article 157.

No session of the Commission shall be valid in the absence of the quorum laid down in its Rules of Procedure.

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SUB-SECTION IV: *The Court of Justice*

ARTICLE 164

The Court of Justice shall ensure observance of the rules of law in the interpretation and application of the present Treaty.

ARTICLE 165

The Court of Justice shall be composed of seven judges.

The Court of Justice shall sit in plenary session. Nevertheless, it may set up within itself divisions, each composed of three or five judges, either for the purpose of conducting certain enquiries or for the purpose of judging certain types of cases, under conditions to be laid down in special regulations.

The Court of Justice shall, however, always sit in plenary session to hear cases submitted to it by a Member State or by one of the organs of the Community, or to deal with interlocutory questions submitted to it under Article 177.

Should the Court of Justice so request, the Council may, by a unanimous vote, increase the number of judges and make the consequent amendments to the second and third sub-paragraphs of the present Article and to the second sub-paragraph of Article 167.

ARTICLE 166

The Court of Justice shall have the assistance of two advocates-general.

The duty of the advocate-general shall be to present publicly, with complete impartiality and independence, reasoned conclusions on cases submitted to the Court of Justice, with a view to assisting the latter in the discharge of its mission as laid down in Article 164.

Should the Court of Justice so request, the Council may, by a unanimous vote, increase the number of advocates-general and make the consequent amendments to the third sub-paragraph of Article 167.

ARTICLE 167

The judges and the advocates-general shall be chosen from among persons of unquestioned impartiality who fulfil the conditions required in their respective countries for the holding of the highest legal offices or who are legal experts of wide repute. They shall be appointed for a term of six years by agreement between the Governments of Member States.

A proportion of the judges shall retire every three years, three and four judges respectively retiring alternately. The three judges whose terms of office expire at the end of the first three-year period shall be chosen by lot.

A proportion of the advocates-general shall retire every three years. The advocate-general whose term of office expires at the end of the first three-year period shall be chosen by lot.

The retiring judges and advocates-general shall be eligible for re-appointment.

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The judges shall elect the President of the Court of Justice from among their own number for a period of three years. The President shall be eligible for re-election.

ARTICLE 168

The Court of Justice shall appoint its Registrar and determine his rules of office.

ARTICLE 169

Should the Commission consider that a Member State has failed to fulfil any of its obligations under the present Treaty, it shall issue a reasoned pronouncement on the matter after giving the State concerned an opportunity to submit its observations.

If the State in question does not comply with such pronouncement within the period prescribed by the Commission, the latter may bring the matter before the Court of Justice.

ARTICLE 170

Any Member State that considers that another Member State has failed to comply with any of its obligations under the present Treaty may bring the matter before the Court of Justice.

Before a Member State initiates, against another Member State, proceedings relating to an alleged violation of the obligations incumbent upon such other Member State in virtue of the present Treaty, it must bring the matter before the Commission.

After the States concerned have been given the opportunity to present observations and replies thereto, both orally and in writing, the Commission shall issue a reasoned pronouncement.

If, within a period of three months from the time when the matter was brought before it, the Commission has not given an opinion, this shall not debar the initiation of proceedings before the Court of Justice.

ARTICLE 171

If the Court of Justice finds that a Member State has failed to fulfil any of its obligations under the present Treaty, such State shall be bound to take the necessary measures to comply with the judgment of the Court.

ARTICLE 172

The regulations laid down by the Council in virtue of the provisions of the present Treaty may confer powers of full jurisdiction on the Court of Justice in respect of any penalties provided for by such regulations.

ARTICLE 173

The Court of Justice shall review the legality of decisions of the Council and Commission, but not of recommendations or opinions. To this end, it shall be competent to give judgment on appeals, lodged by a Member State, the Council or the Commission, on grounds of incompetence, procedural er-

rors, infringement of the present Treaty or of any rule of law relating to its application, or abuse of powers.

Individuals or legal entities may, under the same conditions, submit an appeal against decisions of which they are the object and against decisions which, although in the form of regulations or decisions addressed to another individual or legal entity, are nevertheless of direct personal concern to themselves.

The appeals provided for in the present Article shall be lodged within two months dating, according to circumstances, either from the promulgation of the decision in question, or from its notification to the appellant or failing that, from the day on which the latter had knowledge thereof.

ARTICLE 174

If the appeal is allowed, the Court of Justice shall declare the decision in question to be null and void.

Nevertheless, in the case of regulations, the Court of Justice shall, if it considers it necessary, state which of the effects of the regulations annulled shall be deemed to remain in force.

ARTICLE 175

Should the Council or the Commission fail to take a decision in cases where such decision is provided for under the present Treaty, the Member States and other organs of the Community may bring the matter before the Court of Justice with a view to establishing that such violation of the Treaty has taken place.

Such an appeal shall be heard only if the organ in question has previously been invited to take action. If the aforesaid organ has not made its attitude known within two months of such invitation, an appeal may be lodged within a further period of two months.

In the case of a decision, but not in that of a recommendation or opinion, any individual or legal entity may bring before the Court of Justice, under the conditions laid down in the preceding sub-paragraphs, a complaint against any of the organs of the Community for having failed to notify the said individual or legal entity.

ARTICLE 176

The organ responsible for a decision declared null and void, and any organ whose failure to act has been declared contrary to the provisions of the present Treaty, shall be bound to take the necessary measures to comply with the judgment of the Court of Justice.

This obligation shall in no way affect any obligation arising from the application of the second sub-paragraph of Article 215.

ARTICLE 177

The Court of Justice shall be competent to give interlocutory judgments on issues concerning:

- (a) the interpretation of the present Treaty;
- (b) the validity and interpretation of decisions taken by organs of the Community;
- (c) the interpretation of the statutes of any bodies set up by a decision of the Council, when such statutes so provide.

If any such issue is brought before a judicial tribunal of one of the Member States, such tribunal, if it considers that the issue requires decisions before it can give its own judgment, may ask for a pronouncement from the Court of Justice.

If any such issue is raised in a case being heard by a national tribunal from whose decisions no appeal lies under the national law, the tribunal in question shall bring the matter before the Court of Justice.

ARTICLE 178

The Court of Justice shall be competent to hear cases relating to compensation for damage as provided for in the second sub-paragraph of Article 215.

ARTICLE 179

The Court of Justice shall be competent to give judgment in any dispute between the Community and its agents, within the limits and under the conditions laid down in the rules or regulations applicable to the latter.

ARTICLE 180

The Court of Justice shall be competent, within the limits laid down hereunder, to hear cases concerning:

- (a) the fulfilment by Member States of the obligations arising under the Statutes of the European Investment Bank. The Board of Directors of the Bank shall, in this matter, exercise the powers conferred upon the Commission by Article 169;
- (b) decisions taken by the Board of Governors of the Bank. Any Member State, the Commission and the Board of Directors of the Bank may lodge an appeal against such decisions under the conditions laid down in Article 173;
- (c) decisions taken by the Board of Directors of the Bank. In the case of these decisions, appeals may be lodged, under the conditions laid down in Article 173, only by a Member State or by the Commission, and only on the grounds of non-observance of the procedure laid down in paragraph 2 and paragraphs 5 to 7 inclusive of Article 21 of the Statutes of the Investment Bank.

ARTICLE 181

The Court of Justice shall be competent to give judgment in virtue of any arbitration clause contained in a contract concluded, under public or private law, by or on behalf of the Community.

ARTICLE 182

The Court of Justice shall be competent to give judgment in all disputes between Member States connected with the objects of the present Treaty, if such disputes are submitted to it under the terms of a special agreement.

ARTICLE 183

Subject to the powers conferred on the Court of Justice by the present Treaty, disputes to which the Community is a party shall not on that ground be withdrawn from the competence of national jurisdictions.

ARTICLE 184

In the case of a dispute concerning a regulation adopted by the Council or the Commission, any of the parties concerned may, notwithstanding the expiry of the period prescribed in the third sub-paragraph of Article 173, have recourse to the means provided under the first sub-paragraph of Article 173 in order to plead before the Court of Justice that the regulation in question does not apply.

ARTICLE 185

Appeals lodged with the Court of Justice shall not have any staying effect. Nevertheless, if it considers that circumstances so require, the Court of Justice may order the suspension of the execution of the decision impugned.

ARTICLE 186

In cases submitted to it, the Court of Justice may order any necessary provisional measures.

ARTICLE 187

The judgments of the Court of Justice shall have executory force under the conditions laid down in Article 192.

ARTICLE 188

The Statutes of the Court of Justice shall be contained in a separate Protocol.

The Court of Justice shall adopt its own Rules of Procedure, which shall be submitted for the unanimous approval of the Council.

SECTION 2—PROVISIONS COMMON TO SEVERAL INSTITUTIONS

ARTICLE 189

For the achievement of their purposes and under the conditions laid down in the present Treaty, the Council and the Commission shall frame regulations and directives, take decisions and formulate recommendations or opinions.

. . .

Regulations shall be general in their scope, obligatory in all their parts and directly applicable in each Member State.

Directives shall bind every Member State to which they are addressed, so far as concerns the result to be achieved, but shall leave to the competence of national authorities questions of form and means.

Decisions shall be obligatory in all their parts for the addressees named therein.

Recommendations and opinions shall have no binding force.

ARTICLE 190

The regulations, directives and decisions of the Council and the Commission shall be supported by reasons and shall cover the proposals or opinions which must be called for under the terms of the present Treaty.

ARTICLE 191

The regulations shall be published in the Official Journal of the Community. They shall enter into force on the date given in them or, in default of this, on the twentieth day following their publication.

Directives and decisions shall be notified to their addressees and shall take effect thereupon.

ARTICLE 192

Decisions of the Council or of the Commission which impose a pecuniary obligation upon persons other than the States shall have executory force.

Forced execution shall be governed by the rules of civil procedure in effect in the State in whose territory it takes place. The writ of execution shall be appended, without other formality than the verification of the authenticity of the document, by the national authority which the Government of each of the Member States shall designate for this purpose and notify to the Commission and the Court of Justice.

After completion of these formalities at the request of the party concerned, the latter may proceed with the forced execution by direct application to the organ which is competent under the national law.

Forced execution can be suspended only in virtue of a decision of the Court of Justice. Nevertheless, verification of the regularity of the measures of execution shall be within the competence of the national judicial authorities.

SECTION 3—THE ECONOMIC AND SOCIAL COMMITTEE

ARTICLE 193

An Economic and Social Committee shall be set up with advisory functions.

The Committee shall consist of representatives of the various branches of economic and social life, more particularly, representatives of producers, farmers, transport and general workers, business men and artisans, of the liberal professions and of general interests.

ARTICLE 194

The number of members of the Committee shall be fixed as follows:

Belgium	12
France	24
Germany	24
Italy	24
Luxembourg	5
Netherlands	12

The members of the Committee shall be appointed for four years by the Council, voting unanimously. They shall be eligible for reappointment.

The members of the Committee shall be chosen in their personal capacity, and shall not be bound by any overriding mandate.

ARTICLE 195

1. With a view to the appointment of the members of the Committee, each Member State shall send to the Council a list containing twice as many candidates as there are seats allotted to its nationals.

The Committee must be so composed as to secure adequate representation of the different branches of economic and social life.

2. The Council shall consult the Commission. It may seek the opinion of European organisations representing the various economic and social groups concerned in the work of the Community.

ARTICLE 196

The Committee shall appoint from among its members its chairman and officers for a period of two years.

It shall draw up its own rules of procedure and shall submit them for the Council's approval, which must be unanimous.

The Committee shall be convened by its chairman at the request of the Council or of the Commission.

ARTICLE 197

The Committee shall comprise specialised sections for the main fields covered by the present Treaty.

In particular, it shall contain an agriculture section and a transport section, for both of which separate provisions are included in the Chapters relating to agriculture and transport.

The specialised sections shall operate within the framework of the general powers conferred upon the Committee. They may not be consulted independently of the Committee.

There may also be set up within the Committee sub-committees for the purpose of drawing up draft opinions on specific matters or in specific fields for submission to the Committee.

The rules of procedure shall determine the methods of appointing spec-

specialised sections and sub-committees and the competence conferred upon them.

ARTICLE 198

The Committee must of necessity be consulted by the Council or by the Commission in the cases for which provision is made in the present Treaty. It may also be consulted by these bodies in all cases in which they deem it appropriate to do so.

The Council or the Commission shall, if it considers it necessary, give the Committee a time-limit for the submission of its opinion, which may not be less than ten days following the request therefor addressed to the Chairman. If no opinion has been submitted on the expiry of the time-limit the Council or the Commission may proceed without it.

The opinion of the Committee and that of the specialised section, together with a record of the discussions, shall be forwarded to the Council and to the Commission.

CHAPTER II

Financial Dispositions

ARTICLE 199

Estimates must be drawn up for each financial year for all receipts and expenditures of the Community, including those relating to the European Social Fund, and must be shown in the budget.

The receipts and expenditures of the budget must balance.

ARTICLE 200

1. The budget receipts, apart from revenue from other sources, shall comprise the financial contributions of Member States, fixed on the following proportionate scale:

Belgium	7.9
France	28
Germany	28
Italy	28
Luxembourg	0.2
Netherlands	7.9

2. Nevertheless, the financial contributions of Member States which are intended to meet the expenses of the European Social Fund shall be fixed on the following proportionate scale:

Belgium	8.8
France	32
Germany	32
Italy	20
Luxembourg	0.2
Netherlands	7

3. The proportionate scales may be changed by the Council, voting unanimously.

ARTICLE 201

The Commission shall study the conditions under which the financial contributions of Member States as laid down in Article 200 might be replaced by other appropriate resources, more particularly by revenue accruing from the common customs tariff when this shall have been finally established.

The Commission shall submit proposals in this connection to the Council.

The Council, voting unanimously, may, after consulting the Assembly on these proposals, draw up provisions which it would recommend Member States to adopt in accordance with their respective constitutional rules.

ARTICLE 202

The expenditure entered in the budget shall be authorised for the duration of one financial year, unless any provisions to the contrary are contained in the regulations adopted under Article 209.

Subject to the conditions to be laid down in application of Article 209, any funds, other than those earmarked for staff costs, which are unexpended at the end of the financial year may be carried over, but not beyond the end of the following financial year.

Appropriations shall be set out under different heads, according to type or purpose, and sub-divided, as far as necessary, in accordance with the regulations adopted under Article 209.

There shall be separate sections of the budget for expenditure in connection with the Assembly, the Council, the Commission and the Court of Justice, apart from the entry of certain common expenses under a special head.

ARTICLE 203

1. The financial year shall run from 1 January to 31 December inclusive.

2. Each of the institutions of the Community shall draw up provisional estimates of its expenditure. The Commission shall combine these estimates in a preliminary draft budget; to this it shall attach its comments, which may include divergent estimates.

The preliminary draft budget must be laid before the Council by the Commission not later than 30 September of the year preceding that of its implementation.

The Council shall consult the Commission and, when appropriate, other institutions concerned, if it intends to depart from the preliminary draft.

3. The Council, voting with the prescribed majority, shall establish the draft budget and shall then forward it to the Assembly.

The Assembly must have the draft budget laid before it not later than 31 October of the year preceding that of its implementation.

The Assembly shall be entitled to propose to the Council amendments to the draft budget.

4. If, one month after receiving the draft budget, the Assembly has either stated its approval or has failed to forward its comments to the Council, the draft budget shall be considered as finally adopted.

If, within this period, the Assembly has proposed any amendments, the draft budget, thus amended, shall be forwarded to the Council. The Council shall then discuss it with the Commission and, when appropriate, with the other institutions concerned, and shall finally approve the budget by the prescribed majority.

5. For the approval of the section of the budget relating to the European Social Fund the votes of the members of the Council shall be weighted as follows:

Belgium	8
France	32
Germany	32
Italy	20
Luxembourg	1
Netherlands	7

Decisions shall be valid if supported by at least 67 votes.

ARTICLE 204

If, at the beginning of the financial year, the budget has not yet been approved, expenditure may be made on a monthly basis per section or other division, according to the provisions of the regulations adopted under Article 209, up to one-twelfth of the budget appropriations for the preceding financial year; but the amount thus made available to the Commission shall not exceed one-twelfth of the total appropriations shown in the draft budget in course of preparation.

The Council voting, with the prescribed majority, may, subject to observance of the other conditions stipulated in paragraph 1, authorise expenditure over and above one-twelfth of the appropriations.

Member States shall pay every month, on a provisional basis and in accordance with the proportionate scales adopted for the previous financial year, the amounts necessary to ensure implementation of the present Article.

ARTICLE 205

The Commission shall implement the budget, in accordance with the provisions of the regulations adopted under Article 209, on its own responsibility and within the limits of the funds allocated.

The regulations shall define the particular ways and means whereby each institution shall share in expending its own funds.

Within the budget, the Commission may, subject to the restrictions and the conditions stipulated in the regulations adopted under Article 209, transfer funds among the various heads and sub-heads.

ARTICLE 206

The accounts of all the receipts and expenditures of the budget shall be examined by a supervisory commission composed of auditors of unques-

tionable integrity, one of whom shall be the chairman. The Council, voting unanimously, shall fix the number of auditors. The auditors and the chairman of the supervisory commission shall be appointed by the Council, voting unanimously, for a period of five years. Their remuneration shall be determined by the Council, voting with the prescribed majority.

The auditing of the accounts, which shall be based on vouchers and take place, if necessary, on the premises, is designed to ascertain that all receipts and expenditures are legal and regular and to make certain that financial management is sound. After the close of each financial year, the supervisory commission shall prepare a report which it shall adopt by a majority of its members.

Every year the Commission shall submit to the Council and the Assembly the accounts of the past financial year pertaining to budget operations, together with the report of the supervisory commission. It shall also submit to them a balance sheet showing the assets and liabilities of the Community.

The Council, voting with the prescribed majority, shall give the Commission a discharge in respect of the implementation of the budget. The Council shall notify the Assembly of its decision.

ARTICLE 207

The budget shall be drawn up in the unit of account fixed in accordance with the provisions of the regulations adopted under Article 209.

The financial contributions mentioned in Article 200, paragraph 1, shall be made available to the Community by Member States in their own currency.

The available balances of these contributions shall be deposited with the Treasuries of Member States or organs designated by them. The value of the funds, whilst on deposit, shall remain at the parity rate in force at the time of deposit in relation to the unit of account mentioned in paragraph 1.

These funds may be invested under conditions to be decided by agreements concluded between the Commission and the Member State concerned.

The regulations adopted under Article 209 shall determine the technical conditions for carrying out the financial operations of the European Social Fund.

ARTICLE 208

The Commission may, provided it notifies the competent authorities of the States concerned, transfer its holdings in the currency of any one Member State into the currency of another Member State, so far as this is necessary in order to enable such funds to be used for the purposes for which they are intended by the present Treaty. The Commission shall refrain as far as possible from making such transfers, if it possesses liquid or realisable funds in the currencies it needs.

The Commission shall communicate with each Member State through the authority designated by the State. For financial operations, it shall use the services of the bank of issue of the Member State concerned, or of some other financial institution approved by that State.

ARTICLE 209

On the proposal of the Commission, the Council, voting unanimously, shall:

(a) draw up the financial regulations specifying *inter alia* the methods to be adopted for drafting and implementing the budget and the procedure for rendering and auditing accounts;

(b) determine the methods and procedure whereby Member States' contributions are to be made available to the Commission;

(c) establish rules concerning the responsibility of pay-commissioners and accountants, and arrange for the relevant supervision.

PART VI. GENERAL AND FINAL PROVISIONS

ARTICLE 210

The Community shall enjoy legal personality.

ARTICLE 211

In each of the Member States, the Community shall possess the fullest legal capacity accorded to legal persons by the national laws; in particular it may acquire or dispose of movable and immovable property and be a party to legal proceedings. For this purpose, it shall be represented by the Commission.

ARTICLE 212

The Council, voting unanimously, shall, in collaboration with the Commission and after consulting the other institutions concerned, determine the staff rules and the regime to be applied to other agents of the Community.

After the expiry of the fourth year following the entry into force of the present Treaty, these rules and this regime may be amended by the Council, voting with the prescribed majority, on a proposal of the Commission and after consulting the other institutions concerned.

ARTICLE 213

For the performance of the tasks entrusted to it, the Commission may assemble all information and make any necessary verifications, within the limits and under the conditions fixed by the Council in accordance with the provisions of the present Treaty.

ARTICLE 214

The members of the Community's institutions, members of committees, and officials and agents of the Community, shall be required, even after the termination of their functions, not to divulge information which by its nature is trade secret and, in particular, information relating to firms and concerning their commercial relations or the factors entering into their production costs.

ARTICLE 215

The contractual responsibility of the Community shall be governed by the law applying to the contract in question.

As regards non-contractual responsibility, the Community must, in conformity with the general principles common to the laws of Member States, make good any damage caused by its institutions or by its agents in the discharge of their duties.

The personal responsibility of agents towards the Community shall be determined in the provisions establishing the rules or the regime applicable to them.

ARTICLE 216

The headquarters of the Community's institutions shall be fixed by agreement between the Governments of the Member States.

ARTICLE 217

The official language of the Community's institutions shall be determined by the unanimous vote of the Council, without prejudice to the provisions laid down in the rules of the Court of Justice.

ARTICLE 218

The Community shall enjoy, in the territories of the Member States, the privileges and immunities necessary for the fulfilment of its mission, under conditions specified in a separate Protocol.*

ARTICLE 219

Member States undertake not to submit a dispute concerning the interpretation or application of the present Treaty to any method of settlement other than those provided for in the Treaty.

ARTICLE 220

Member States shall, so far as necessary, engage in negotiations with each other with a view to ensuring for their nationals

the protection of persons and the enjoyment and protection of rights under the conditions granted by each State to its own nationals, the abolition of double taxation within the Community,

mutual recognition of companies within the meaning of Article 58, paragraph 2, the retention of their legal personality in cases where the registered office is transferred from one country to another, and the possibility for companies subject to the laws of different Member States to form mergers,

the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and arbitral awards.

* Not printed here.

ARTICLE 221

Within three years of the entry into force of the present Treaty, Member States shall accord to nationals of other Member States the same facilities as regards financial participation in the capital of companies within the meaning of Article 58 as they accord to their own nationals, without prejudice to application of the other provisions of the present Treaty.

ARTICLE 222

The present Treaty shall be entirely without prejudice to the system of ownership in Member States.

ARTICLE 223

1. The provisions of the present Treaty shall not be incompatible with the following rules:

(a) no State shall be obliged to supply information the disclosure of which it considers contrary to the vital interests of its security.

(b) each Member State may take the measures which it considers necessary to protect the vital interests of its security, and which are connected with the manufacture or sale of arms, munitions and war materials; these measures must not interfere with conditions of competition in the common market in respect of products not intended for specifically military purposes.

2. During the first year after the entry into force of the present Treaty, the Council, voting unanimously, shall establish the list of products to which the provisions of paragraph 1 shall apply.

3. The Council, voting unanimously on a proposal by the Commission, may amend the said list.

ARTICLE 224

Member States shall consult one another for the purpose of taking in common the necessary measures to prevent the operation of the common market from being affected by measures which a Member State may be led to take in case of serious internal disturbances affecting public order, in case of war or serious international tension constituting a threat of war, or in order to fulfil undertakings into which it has entered for the purpose of maintaining peace and international security.

ARTICLE 225

If the measures taken in the cases mentioned in Articles 223 and 224 in fact disturb conditions of competition in the common market, the Commission, acting in conjunction with the State concerned, shall examine how these measures may be adapted to the rules established by the present Treaty.

By derogation from the procedure provided for in Articles 169 and 170, the Commission or any Member State may apply direct to the Court of Justice if it considers that another Member State is abusing the powers

provided for under Articles 223 and 224. The Court of Justice shall hear the case *in camera*.

ARTICLE 226

1. During the transitional period, in case of serious difficulties which are likely to persist in any sector of economic activity, or difficulties which may seriously impair the economic situation in any region, a Member State may ask for authorisation to take safeguard measures to restore the situation and adapt the sector in question to the common market economy.

2. At the request of the State concerned, the Commission shall immediately take emergency action to decide upon the safeguard measures it considers necessary, specifying the conditions and ways and means of applying them.

3. The measures authorised under paragraph 2 may include derogations from the rules established by the present Treaty, to the extent and for the periods strictly necessary for the achievement of the aims referred to in paragraph 1.

In the selection of suitable measures, priority must be given to those which will least disturb the operation of the common market.

ARTICLE 227

1. The present Treaty shall apply to the Kingdom of Belgium, the French Republic, the German Federal Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands.

2. With regard to Algeria and the French Departments overseas, the provisions of the present Treaty relating to:

- the free movement of goods,
- agriculture, with the exception of Article 40, paragraph 4,
- the liberalisation of services,
- the rules of competition,
- the safeguard measures provided for in Articles 108, 109 and 226,
- the institutions,

shall apply as from the date of the entry into force of the present Treaty.

The conditions for the implementation of the other provisions of the present Treaty shall be determined, not later than two years after its entry into force, by decisions of the Council, voted unanimously on a proposal of the Commission.

Within the framework of the procedures provided for in the present Treaty and, in particular, in Article 226, the institutions of the Community shall take care to ensure the economic and social development of the regions in question.

3. The overseas countries and territories listed at Annex IV of the present Treaty shall be the subject of the special system of association described in Part IV of the present Treaty.

4. The provisions of the present Treaty shall apply to European territories for whose foreign relations a Member State is responsible.

2. Agreements concluded under the conditions laid down above shall be binding on the institutions of the Community and on Member States.

It shall further assure appropriate contacts with all international organisations.

The Community shall co-operate in every useful way with the Council of Europe.

The Community shall establish with the Organisation for European Economic Co-operation close collaboration, the details of which shall be determined by common agreement.

2. The provisions of the present Treaty shall not derogate from the stipulations of the Treaty establishing the European Atomic Energy Community.

The provisions of the present Treaty shall not be incompatible with the existence or establishment of the regional unions between Belgium and Luxembourg, and between Belgium, Luxembourg and the Netherlands, so far as the objects of these regional unions are not achieved by application of the present Treaty.

ARTICLE 234

The rights and obligations resulting from conventions concluded prior to the entry into force of the present Treaty, between one or more Member States and one or more outside States, shall not be affected by the provisions of the present Treaty.

In so far as such conventions are not compatible with the present Treaty, the Member State or States in question shall take all suitable steps to remove such incompatibility as is found to exist. If necessary, Member States shall lend each other assistance in order to achieve this purpose and, when appropriate, shall adopt a common attitude.

In the implementation of the conventions referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the present Treaty by each Member State form an integral part of the establishment of the Community and are therefore inseparably linked to the creation of common institutions, the conferment upon them of their powers and the concession of the same advantages by all the other Member States.

ARTICLE 235

If action by the Community appears necessary to achieve one of the aims of the Community, in the operation of the common market, and if the present Treaty has not provided the powers of action required for this purpose, the Council, voting unanimously on a proposal by the Commission, and after consulting the Assembly, shall take the appropriate steps.

ARTICLE 236

The Government of any Member State or the Commission may submit to the Council proposals for the revision of the present Treaty.

If the Council, after consulting the Assembly and, when appropriate, the Commission declares itself in favour of the calling of a conference of representatives of the Governments of Member States, such conference shall be convened by the President of the Council for the purpose of agreeing upon the amendments to be made to the present Treaty.

Amendments shall enter into force after being ratified by all Member States in conformity with their respective constitutional rules.

ARTICLE 237

Any European State may ask to join the Community. It shall address its request to the Council which, after taking the opinion of the Commission, shall decide by a unanimous vote.

The conditions of admission and the adaptations to the present Treaty entailed thereby shall be the subject of an agreement between the Member States and the applicant State. The said agreement shall be submitted for ratification by all the contracting States, in conformity with their respective constitutional rules.

ARTICLE 238

The Community may conclude with an outside State, a union of States or an international organisation agreements creating an association characterised by reciprocal rights and obligations, joint action and special procedures.

Such agreements shall be concluded by the Council voting unanimously after consulting the Assembly.

Whenever such agreements involve amendments to the present Treaty, such amendments must first be adopted according to the procedure laid down in Article 236.

ARTICLE 239

The Protocols, which are to be annexed to the present Treaty by agreement between the Member States, shall form an integral part thereof.

ARTICLE 240

The present Treaty shall be concluded for an indefinite period.

ESTABLISHMENT OF THE INSTITUTIONS

ARTICLE 241

The Council shall meet within one month from the entry into force of the Treaty.

ARTICLE 242

The Council shall take all necessary measures to set up the Economic and Social Committee within three months of the Council's first meeting.

ARTICLE 243


The Assembly shall meet, at the summons of the President of the Council, within two months of the Council's first meeting, to elect its officers and draw up its rules of procedure. Until its officers are elected, the Assembly shall be presided over by its oldest member.

ARTICLE 244

The Court of Justice shall enter upon its duties immediately on the appointment of its members. Its first President shall be chosen for three years under the same conditions as its members.

The Court of Justice shall draw up its rules of procedure within three months of assuming its duties.

Cases may not be brought before the Court of Justice until after the date of publication of these rules of procedure, and the time-limits for the lodging of appeals shall run only from that same date.

From the date of his appointment, the President of the Court of Justice shall exercise the powers conferred upon him by the present Treaty. 

ARTICLE 245

The Commission shall enter upon its duties and assume the responsibilities entrusted to it by the present Treaty as soon as its members are appointed.

Immediately on entering upon its duties, the Commission shall undertake the studies and establish the contacts which are necessary for obtaining an overall view of the economic situation of the Community.

ARTICLE 246

1. The first financial period shall extend from the date of the entry into force of the Treaty until 31 December following. However, this period shall continue until 31 December of the year following that of the entry into force of the Treaty, if this occurs in the second half of the year.

2. Until the budget for the first financial period is drawn up, Member States shall make advances to the Community. These advances, which shall not bear interest, shall be deductible from the financial contributions payable under the said budget.

3. Until the staff rules and the regime to be applied to the other agents of the Community, provided for in Article 212, are established, each institution shall recruit the staff it needs and shall, for this purpose, conclude contracts of limited duration.

Each institution shall examine with the Council questions concerning the number, remuneration and allocation of posts.

FINAL PROVISIONS

ARTICLE 247

The present Treaty shall be ratified by the High Contracting Parties according to their respective constitutional rules. The instruments of ratification shall be deposited with the Government of the Italian Republic.

The present Treaty shall enter into force on the first day of the month following the deposit of the instrument of ratification by the signatory State which is the last to accomplish this formality. However, if this deposit is made less than fifteen days before the beginning of the following month, the Treaty shall not enter into force until the first day of the second month following the date of such deposit.

ARTICLE 248

The present Treaty, drawn up in a single copy, in German, French, Italian and Dutch, all four texts being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which shall transmit a certified true copy to each of the Governments of the other signatory States.

IN FAITH WHEREOF, the undersigned Plenipotentiaries have placed their signatures at the end of the present Treaty.

Done at Rome, the twenty-fifth day of March, one thousand nine hundred and fifty-seven.

[Signed] P. H. SPAAK.	[Signed] J. CH. SNOY ET D'OPPUERS.
[Signed] ADENAUER.	[Signed] HALLSTEIN.
[Signed] PINEAU.	[Signed] M. FAURE.
[Signed] ANTONIO SEGNI.	[Signed] GAETANO MARTINO.
[Signed] BECH.	[Signed] LAMBERT SCHAUS.
[Signed] J. LUNS.	[Signed] J. LINTHORST HOMAN.

[Annexes I and II omitted here.]

ANNEX III

LIST OF INVISIBLE TRANSACTIONS PROVIDED IN ARTICLE 106 OF THE TREATY

Maritime freights, including chartering, harbour expenses, disbursements for fishing vessels, etc.

Inland waterway freights, including chartering.

Road transport: passengers and freights, including chartering.

Air transport: passengers and freights, including chartering.

Payment by passengers of international air tickets and excess luggage charges; payment of international air freight charges and chartered flights.

Receipts from the sale of international air tickets, excess luggage charges, international air freight charges, and chartered flights.

For all means of maritime transport: harbour services (bunkering and provisioning, maintenance, repairs, expenses for crews, etc.).

For all means of inland waterway transport: harbour services (bunkering and provisioning, maintenance and minor repairs of equipment, expenses for crews, etc.).

For all means of commercial road transport: fuel, oil, minor repairs, garaging, expenses for drivers and crews, etc.

For all means of air transport: operating costs and general overheads, including repairs to aircraft and to air transport equipment.

Warehousing and storage charges, customs clearance.

Customs duties and fees.

Transit charges.

Repair and assembly charges.

Processing, finishing, processing of work under contract, and other services of the same nature.

Repair of ships.

Repair of means of transport other than ships and aircraft.

Technical assistance (assistance relating to the production and distribution of goods and services at all stages, given over a period limited according to the specific purpose of such assistance, and including e.g. advice or visits by experts, preparation of plans and blueprints, supervision of manufacture, market research, training of personnel).

Commission and brokerage.

Profits arising out of transit operations or sales of trans-shipment.

Banking commissions and charges.

Representation expenses.

Advertising by all media.

Business travel.

Participation by subsidiary companies and branches in overhead expenses of parent companies situated abroad and vice-versa.

Contracting (construction and maintenance of buildings, roads, bridges, ports etc. carried out by specialised firms and, generally, at fixed prices after open tender).

Differences, margins and deposits due in respect of operations on commodity terminal markets in conformity with normal *bona fide* commercial practice.

Tourism.

Travel for private reasons (education).

Travel for private reasons (health).

Travel for private reasons (family).

Subscriptions to newspapers, periodicals, books, musical publications.

Newspapers, periodicals, books, musical publications and records.

Printed films, commercial, documentary, educational, etc. (rentals, dues, subscriptions, reproduction and synchronisation fees, etc.).

Membership fees.

Current maintenance and repair of private property abroad.

Government expenditure (official representation abroad, contributions to international organisations).

Taxes, court expenses, registration fees for patents and trade marks.

Claims for damages.

Refunds in the case of cancellation of contracts and refunds of uncalled-for payments.

Fines.

Periodical settlements in connection with public transport and postal, telegraphic and telephone services.

Exchange authorisations granted to own or foreign nationals emigrating.

Exchange authorisations granted to foreign nationals returning to their country of origin.

Salaries and wages (of frontier or seasonal workers and of other nonresidents, without prejudice to the right of a country to regulate terms of employment of foreign nationals).

Emigrants' remittances (without prejudice to the right of a country to regulate immigration).

Fees.

Dividends and shares in profits.

Interests on debentures, mortgages etc.

Rent.

Contractual amortisation (with the exception of transfers in connection with amortisation having the character either of anticipated repayments or

of the discharge of accumulated arrears).

Profits from business activity.

Authors' royalties.

Patents, designs, trade marks, and inventions (the assignment and licensing of patent rights, designs, trade marks and inventions, whether or not legally protected, and transfers arising out of such assignment or licensing).

Consular receipts.

Pensions and other income of a similar nature.

Maintenance payments resulting from a legal obligation or from a decision of a Court and financial assistance in cases of hardship.

Transfers by installments of assets deposited in one Member country by persons residing in another Member country whose personal income in that country is not sufficient to cover their living expenses.

Transactions and transfers in connection with direct insurance.

Transactions and transfers in connection with reinsurance retrocession.

Opening and reimbursement of commercial or industrial credits.

Transfer of minor amounts abroad.

Charges for documentation of all kinds incurred on their own account by authorised dealers in foreign exchange.

Sports prizes and racing earnings.

Inheritances.

Dowries.

ANNEX IV

OVERSEAS COUNTRIES AND TERRITORIES TO WHICH THE PROVISIONS OF PART IV OF THE TREATY APPLY

French West Africa including: Senegal, the Sudan, Guinea, the Ivory Coast, Dahomey, Mauretania, the Niger, the Upper Volta.

French Equatorial Africa including: the Middle Congo, Ubangi-Shari, Chad, Gaboon.

St. Pierre and Miquelon, the Comoro Archipelago, Madagascar and dependencies, the French Somali Coast, New Caledonia and dependencies, the French Settlements in Oceania, the Southern and Antarctic Territories.

The Autonomous Republic of Togoland.

The French Trusteeship Territory in the Cameroons.

The Belgian Congo and Ruanda-Urundi.

The Italian Trusteeship Territory in Somaliland.

Dutch New Guinea.

ANNEX V

PROTOCOL ON THE STATUTE OF THE EUROPEAN INVESTMENT BANK

THE HIGH CONTRACTING PARTIES

DESIROUS of establishing the Statutes of the European Investment Bank, provided for in Article 129 of the Treaty,

HAVE AGREED on the following provisions, which shall be annexed to the present Treaty:

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ARTICLE 1

The European Investment Bank set up by Article 129 of the Treaty, hereinafter called "The Bank," shall be constituted, and shall carry out its functions and activities, in conformity with the provisions of the Treaty and of the present Statutes.

The seat of the Bank shall be decided upon by agreement between the Governments of the Member States.

ARTICLE 2

The objects of the Bank shall be those laid down in Article 130 of the Treaty.

ARTICLE 3

In accordance with Article 129 of the Treaty, the following shall be members of the Bank:

the Kingdom of Belgium
the French Republic
the German Federal Republic
the Italian Republic
the Grand Duchy of Luxembourg
the Kingdom of the Netherlands.

ARTICLE 4

1. The capital of the Bank shall consist of one thousand million units of account subscribed by the Member States in the following amounts:

Belgium	86.5 million
France	300 million
Germany	300 million
Italy	240 million
Luxembourg	2 million
Netherlands	71.5 million

The value of one unit of account shall be 0.88867088 grammes of fine gold.

The Member States shall be responsible only up to the amount of their share of capital subscribed and not paid up.

2. The admission of a new member shall entail an increase in the subscribed capital corresponding to the additional capital brought in by the new member.

3. The Board of Governors, by a unanimous vote, may decide to increase the subscribed capital.

4. The share of the subscribed capital may not be ceded, or given as collateral security, and shall not be attachable.

ARTICLE 5

1. The Member States shall pay up 25% of the subscribed capital, by five equal payments to be made not later than two months, nine months, sixteen months, twenty-three months and thirty months, respectively, from the date of entry into force of the Treaty.

Each payment shall be made, as to one-quarter in gold or a freely convertible currency, and as to three-quarters in national currency.

2. The Board of Directors may demand that the remaining 75% of the subscribed capital be paid up, should such payment become necessary in order to meet the obligations of the Bank towards those who have provided its funds.

Each Member State shall pay an amount proportionate to its share of the subscribed capital, in the currencies needed by the Bank in order to meet the aforesaid obligations.

ARTICLE 6

1. On the proposal of the Board of Directors, the Board of Governors may decide, by the prescribed majority, that Member States shall grant the Bank special interest-bearing loans if and so far as the Bank requires such loans in order to finance specific projects, provided that the Board of Directors furnishes proof that it is unable to obtain the necessary resources itself, on suitable conditions, on the capital markets, due regard being had to the nature and object of the projects to be financed.

2. Special loans may not be asked for before the beginning of the fourth year following the entry into force of the Treaty. They must not exceed a total of 400 million units of account, or of 100 million units of account a year.

3. The term of special loans shall be decided in the light of the term of the credits or guarantees which the Bank proposes to grant by means of such loans; it shall not exceed twenty years. The Board of Governors, voting with the prescribed majority on a proposal by the Board of Directors, may decide upon anticipated repayment of a special loan.

4. Special loans shall bear interest at 4% per annum, unless the Board of Governors, having regard to the trend and level of rates of interest on the capital markets, shall decide to fix a different rate.

5. Special loans shall be granted by the Member States in proportion to their subscription to the capital; they shall be paid in national currency within six months of their being asked for.

6. In the event of the liquidation of the Bank, special loans made by Member States shall be repaid only after settlement of the other debts of the Bank.

ARTICLE 7

1. Should the par value of the currency of a Member State fall in relation to the unit of account as defined in Article 4, the amount of that State's share of the capital paid up by it in its national currency shall be adjusted, ° °

proportionately to the change occurring in the par value, by an additional payment made by the State in question to the Bank. Nevertheless, the amount subject to adjustment may not exceed the total amount of loans granted by the Bank in the currency concerned and the Bank's resources in that currency. The additional payment shall be made within a period of two months or, so far as it corresponds to loans, on the dates on which such loans fall due.

2. Should the par value of the currency of a Member State rise in relation to the unit of account as defined in Article 4, the amount of that State's share of the capital paid up by it in its national currency shall be adjusted proportionately to the change occurring in the par value, by a repayment made by the Bank to the State in question. Nevertheless, the amount subject to adjustment may not exceed the total amount of loans granted by the Bank in the currency concerned and the Bank's resources in that currency. The repayment shall be made within a period of two months or, so far as it corresponds to loans, on the dates on which such loans fall due.

3. The par value of the currency of a Member State in relation to the unit of account as defined in Article 4 shall be the relation between the weight of fine gold contained in the unit of account and the weight of fine gold corresponding to the par value of such currency as declared to the International Monetary Fund. Failing this, the par value shall be given by the rate of exchange against a currency either quoted in or convertible into gold, applied by the Member State for current payments.

4. The Board of Governors may decide not to apply the rules laid down in paragraphs 1 and 2 above, should there be a uniformly proportionate adjustment in the par value of all the currencies of the countries members of the International Monetary Fund or of the members of the Bank.

ARTICLE 8

The Bank shall be administered and managed by a Board of Governors, a Board of Directors and a Management Committee.

ARTICLE 9

1. The Board of Governors shall consist of Ministers appointed by the Member States.

2. The Board of Governors shall lay down general directives concerning the credit policy of the Bank, particularly with regard to the various objectives which will require to be pursued as the common market gradually comes into being.

The Board of Governors shall supervise the implementation of these directives.

3. In addition, the Board of Governors shall:

(a) decide on any increase in the subscribed capital, in accordance with paragraph 3 of Article 4;

(b) exercise the powers provided for in Article 6 with regard to special loans;

(c) exercise the powers provided for in Articles 11 and 13 with regard to the appointment and removal from office of members of the Board of Directors and the Management Committee;

(d) authorise the derogation provided for in paragraph 1 of Article 18;

(e) approve the Annual Report drawn up by the Board of Directors;

(f) approve the annual balance sheet and also the profit and loss account;

(g) exercise the powers and functions provided for in Articles 7, 14, 17, 26 and 27;

(h) approve the Rules of Procedure of the Bank.

4. Within the framework of the Treaty and the present Statutes, the Board of Governors, voting unanimously, is empowered to take any decisions with regard to suspension of the Bank's activities and, should the case arise, its liquidation.

ARTICLE 10

Except where otherwise provided in the present Statutes, the Board of Governors shall take its decisions by a majority vote of its members. Votes of the Board of Governors shall be governed by the provisions of Article 148 of the Treaty.

ARTICLE 11

1. The Board of Directors shall have exclusive powers of decision in respect of the granting of credits and guarantees and of the raising of loans; it shall fix the rates of interest for loans and also the rates of commission on guarantees; it shall supervise the sound administration of the Bank; it shall ensure that the management of the Bank conforms to the provisions of the Treaty and of the Statutes, and to the general directives laid down by the Board of Governors.

At the end of the financial year, the Board of Directors shall submit a report to the Board of Governors and shall publish it after approval.

2. The Board of Directors shall consist of twelve directors and twelve deputies.

The directors shall be appointed by the Board of Governors for a period of five years, on nomination by the Member States and the Commission respectively, as follows:

2 directors nominated by common agreement by the Benelux countries;

3 directors nominated by the French Republic;

3 directors nominated by the German Federal Republic;

3 directors nominated by the Italian Republic;

1 director nominated by the Commission.

They shall be re-eligible.

Each director shall have a deputy, appointed under the same conditions and according to the same procedure as the directors.

The deputies may take part in the meetings of the Board of Directors but

without the right to vote unless replacing a director if the latter is unable to be present.

The Chairman or, in his absence, one of the Vice-Chairmen of the Management Committee shall preside over meetings of the Board of Directors, but shall not vote.

The members of the Board of Directors shall be chosen from amongst persons of note, selected for their ability and integrity. They shall be responsible only to the Bank.

3. A director may, by decision of the Board of Governors, voting with the prescribed majority, be removed from office only if he no longer fulfils the conditions necessary for the exercise of his functions.

If the annual report is not approved, this shall entail the resignation of the Board of Directors.

4. In the event of a vacancy or vacancies arising as a result of death, or of individual or collective resignation or removal from office, such vacancy or vacancies shall be filled according to the rules laid down in the preceding paragraph. Apart from cases of complete change of membership, members shall be replaced for the remainder of their term of office.

5. The Board of Governors shall fix the remuneration of members of the Board of Directors. Any question of incompatibility with regard to the functions of a Director or a deputy, shall be decided by the Board of Governors, voting unanimously.

ARTICLE 12

1. Each Director shall have one vote on the Board of Directors.

2. Unless otherwise provided in the present Statutes, the Board of Directors shall take its decisions by simple majority of the members of the Board entitled to vote. The prescribed majority shall require at least eight votes. The Rules of Procedure of the Bank shall fix the quorum in the absence of which decisions of the Board of Directors shall not be valid.

ARTICLE 13

1. The Management Committee shall consist of a chairman and two vice-chairmen, appointed for a period of six years by the Board of Governors on the proposal of the Board of Directors. They shall be re-eligible.

2. On the proposal of the Board of Directors, adopted by the prescribed majority, the Board of Governors, also voting with the prescribed majority, may remove from office members of the Management Committee.

3. The Management Committee shall be responsible for the day-to-day operations of the Bank, under the authority of the Chairman and under the supervision of the Board of Directors.

It shall prepare the decisions of the Board of Directors with regard, in particular, to the raising of loans and the granting of credits and guarantees. It shall be responsible for the implementation of such decisions.

4. The Management Committee, voting by a majority, shall formulate its opinions concerning means for the granting of loans and guarantees and concerning plans for the raising of loans.

5. The Board of Governors shall fix the remuneration of members of the Management Committee and decide on cases of incompatibility with their functions.

6. The Chairman or, if he is prevented, one of the Vice-Chairmen shall represent the Bank in judiciary or extra-judiciary matters.

7. The officials and employees of the Bank shall be under the authority of the Chairman and shall be engaged and dismissed by him. In the choice of staff, account must be taken not only of personal skills and professional qualifications, but also of a fair representation of the nationals of Member States.

8. The Management Committee and the staff of the Bank shall be responsible to the Bank only, and shall be completely independent in the exercise of their functions.

ARTICLE 14

1. A Committee of three members, appointed on grounds of their competence by the Board of Governors, shall each year verify that the operations of the Bank are properly conducted and the books properly kept.

2. It shall confirm that the balance sheet and profit and loss account are in conformity with the accounts and vouchers and faithfully reflect the situation of the Bank in regard to assets and liabilities.

ARTICLE 15

The Bank shall communicate with each Member State through the authority designated by the latter. In the conduct of financial operations, the Bank shall have recourse to the bank of issue of the Member State concerned, or to other financial institutions approved by the latter.

ARTICLE 16

1. The Bank shall co-operate with all international organisations whose fields of activity are similar to its own.

2. The Bank shall seek all suitable contacts facilitating co-operation with the banking and financial institutions of the countries to which it extends its operations.

ARTICLE 17

At the request of a Member State or of the Commission, or at its own initiative, the Board of Governors shall interpret or supplement, under the same conditions as those under which they were adopted, the directives laid down by it under the terms of Article 9 of the present Statutes.

ARTICLE 18

1. Within the framework of the mandate defined in Article 130 of the Treaty, the Bank shall grant credits to its members or to public or private enterprises for investment projects to be carried out within the European

territories of Member States, so far as means from other sources are not available on reasonable terms.

Nevertheless, by derogation authorised unanimously by the Board of Governors on the proposal of the Board of Directors, the Bank may grant credits for investment projects to be carried out, in whole or in part, outside the European territories of Member States.

2. The granting of loans shall, as far as possible, be made dependent on the employment of other means of financing.

3. Upon agreeing to grant a loan to an enterprise or authority other than a Member State, the Bank shall make the granting of such loans dependent on either a guarantee from the Member State within whose territory the project is to be carried out or on other adequate guarantees.

4. The Bank may guarantee loans raised by public or private enterprises or by local authorities for the purpose of carrying out operations provided for in Article 130 of the Treaty.

5. The total sum of loans and guarantees granted by the Bank shall not exceed 250% of the amount of the subscribed capital.

6. The Bank shall protect itself against exchange risks by including in contracts for loans or guarantees such clauses as it considers appropriate.

ARTICLE 19

1. The rates of interest on loans to be granted by the Bank and the rates of commission on guarantees must be adapted to prevailing conditions on the capital market and must be calculated so that the receipts therefrom shall enable the Bank to meet its obligations to cover its expenses and to constitute a reserve fund as provided for in Article 24.

2. The Bank shall not grant any reduction in rates of interest. Should a reduction in the rate of interest appear desirable, having regard to the particular nature of the project to be financed, the Member State concerned or a third party may grant a bonus on the interest in so far as the grant of such bonus is compatible with the rules laid down in Article 92 of the Treaty.

ARTICLE 20

In its operations relating to loans and guarantees, the Bank shall observe the following principles:

1. It shall ensure that its funds are employed in the most rational manner in the interests of the Community.

It may issue loans or provide guarantees for raising loans only:

(a) when the service of interest and amortisation is guaranteed by working profits in the case of projects carried out by enterprises in the sector of production or by an undertaking subscribed by the State in which the project is carried out, or given in some other way, in the case of other projects;

(b) and when the execution of the project contributes to the increase of economic productivity in general and promotes the development of the common market.

2. It shall not acquire any share in any enterprise or undertake any responsibility in the management thereof unless this is necessary for the protection of its own rights, in order to guarantee recovery of its debt.

3. It may dispose of its claims on the capital market and may, for this purpose, require its debtors to issue bonds or other securities.

4. Neither the Bank nor the Member States shall impose any conditions according to which the sums lent must be expended within any specific Member State.

5. It may make the granting of loans dependent on the organisation of international tenders.

6. It shall not finance, either in whole or in part, any project which is opposed by the Member State within whose territory it is to be executed.

ARTICLE 21

1. Requests for loans or guarantees may be addressed to the Bank either through the Commission or through the Member State in whose territory the project is to be carried out. An enterprise also may apply direct to the Bank for a loan or a guarantee.

2. Requests made through the Commission shall be submitted to the Member State in whose territory the project is to be carried out, for its opinion. Requests made through the State shall be submitted to the Commission for its opinion. Requests made direct by an enterprise shall be submitted to the Member State concerned and to the Commission.

The Member States concerned and the Commission shall give their opinions within at latest two months. Failing a reply by the end of this period, the Bank may assume that the project in question gives rise to no objections.

3. The Board of Directors shall decide upon requests for loans or guarantees which are submitted to it by the Management Committee.

4. The Management Committee shall examine whether requests for loans or guarantees submitted to it are in conformity with the provisions of the present Statutes, in particular, with those of Article 20. If the Management Committee decides in favour of granting the loan or guarantee, it shall submit the draft contract to the Board of Directors. It may make its favourable opinion dependent on such conditions as it thinks essential. If the Management Committee decides against granting the loan or guarantee, it shall submit the relevant documents to the Board of Directors together with its opinion.

5. If the Management Committee gives an unfavourable opinion, a unanimous vote by the Board of Directors shall be required for the granting of the loan or guarantee.

6. If the Commission gives an unfavourable opinion, a unanimous vote by the Board of Directors shall be required for the granting of the loan or guarantee, the director nominated by the Commission abstaining from voting on this occasion.

7. If both the Management Committee and the Commission give an unfavourable opinion, the Board of Directors shall not grant the loan or guarantee in question.

ARTICLE 22

1. The Bank shall raise loans, on the international capital markets, in order to procure the resources necessary to the accomplishment of its tasks.

2. The Bank may raise a loan on the capital market of a Member State, within the framework of the legal provisions applying to internal issues or, if there are no such provisions in a Member State, when the Member State in question and the Bank have concerted together and reached an agreement concerning the loan contemplated by the latter.

The competent authorities in the Member State may not refuse their assent unless serious disturbances on the capital market of that State are to be feared.

ARTICLE 23

1. The Bank may employ any available funds which it does not immediately need in order to meet its obligations, under the following conditions:

- (a) it may make investments in the money markets,
- (b) subject to the provisions of paragraph 2 of Article 20 it may buy and sell securities issued by itself or by its debtors;
- (c) it may transact any other financial operation consistent with its objective.

2. Without prejudice to the provisions of Article 25, the Bank, in managing its investments, shall not engage in any arbitrage of exchange that is not directly necessitated by the realisation of its credits or by the fulfilment of obligations it has contracted through the loans it has floated or guarantees it has granted.

3. In all activities covered by the present Article, the Bank shall act in agreement with the competent authorities of the Member States or with their respective banks of issue.

ARTICLE 24

1. A reserve fund, amounting to 10% of the subscribed capital, shall be built up progressively. Should the position of the Bank's obligations justify such action, the Board of Directors may decide to constitute additional reserves. Until this reserve fund has been completely built up, the following shall be put towards it:

(a) receipts from interest on loans granted by the Bank out of the amounts to be paid up by Member States under Article 5;

(b) receipts from interest on loans granted by the Bank out of the funds derived from repayment of the loans referred to in paragraph (a) above,

in so far as these receipts from interest are not required to meet the obligations of the Bank or to cover its expenses.

2. The amounts in the reserve fund shall be invested so as to be at all times available to meet the purpose of that fund.

ARTICLE 25

1. The Bank shall at all times have full authority to transfer its holdings in the currency of one of the Member States into the currency of another Member State, in order to carry out financial operations in conformity with its object as laid down in Article 130 of the Treaty, due regard being had to the provisions of Article 23 of the present Statutes. The Bank shall, so far as possible, avoid making such transfers if it possesses holdings readily available, or that can be mobilised, in the currency it needs.

2. The Bank may not convert its holdings in the currency of one of the Member States into the currency of an outside country without the agreement of the Member State concerned.

3. The Bank may dispose freely both of that part of its capital which is paid up in gold or convertible currencies, and also of foreign currency borrowed on an outside market.

4. The Member States undertake to make available to the Bank's debtors the foreign currency necessary for the repayment of capital and interest in respect of loans granted or guaranteed by the Bank in connection with projects to be carried out in their territories.

ARTICLE 26

Should a Member State fail to fulfil the obligations devolving on it as a member under the present Statutes and, in particular, that of paying up its share of the subscribed capital or its special loans, or of ensuring the service of its borrowings, the granting of loans or guarantees to that Member State or to its nationals may be suspended by a decision of the Board of Governors, voting with the prescribed majority.

Such a decision shall not free either the State itself or its nationals from their obligations towards the Bank.

ARTICLE 27

1. Should the Board of Governors decide to suspend the activities of the Bank, all the latter's activities shall immediately be brought to a standstill, with the exception of operations necessary to ensure the due utilisation, protection and conservation of its property and the fulfilment of its undertakings.

2. In the event of liquidation, the Board of Governors shall appoint the liquidators and give them instructions for carrying out the liquidation.

ARTICLE 28

1. The Bank shall, in each of the Member States, enjoy the widest legal capacity accorded to corporate bodies under the respective internal laws of those States, including, in particular, the right to acquire and dispose of movable and immovable property and to be a party to legal proceedings.

The privileges and immunities to be granted to the Bank shall be laid down in the Protocol provided for in Article 218 of the Treaty.

2. The property of the Bank shall be exempt from all forms of requisitioning and expropriation.

ARTICLE 29

Subject to the powers granted to the Court of Justice, the appropriate national tribunals shall be competent in respect of any litigation between the Bank and its creditors or debtors or between the Bank and third parties.

The Bank shall elect domicile in each of the Member States. Nevertheless, it may, in any contract, specify a special domicile or provide for arbitration procedure.

The property and assets of the Bank shall not be subject to seizure or to forced execution, except by decision of the courts.

Done at Rome, the twenty-fifth day of March, one thousand nine hundred and fifty-seven.

[Here follow signatures as given above.]

APPLICATORY CONVENTION RELATING TO THE ASSOCIATION OF THE OVERSEAS COUNTRIES AND TERRITORIES WITH THE COMMUNITY

THE HIGH CONTRACTING PARTIES,

DESIROUS of establishing the Applicatory Convention provided for in Article 136 of the Treaty,

HAVE AGREED upon the following provisions, which shall be annexed to the present Treaty:

ARTICLE 1

The Member States shall participate under the conditions laid down hereunder, in any measures likely to promote the social and economic development of the countries and territories listed in Annex IV to the Treaty, their action in this matter being complementary to that taken by the authorities responsible for those countries or territories.

With this object, there shall be set up a Development Fund for the overseas countries and territories, into which the Member States shall, during a period of five years, pay the annual contributions provided for in Annex A to the present Convention.

The Fund shall be administered by the Commission.

ARTICLE 2

The authorities responsible for the countries and territories shall, in agreement with the local authorities or representatives of the people of the countries or territories concerned, submit to the Commission any social or economic projects for which financing by the Community is requested.

ARTICLE 7

The prescribed majority referred to in Articles 4, 5 and 6 above shall be 67 votes. The Member States shall have the following number of votes, respectively:

Belgium	11 votes
France	33 votes
Germany	33 votes
Italy	11 votes
Luxembourg	1 vote
Netherlands	11 votes

ARTICLE 8

In each of the countries or territories, the right of establishment shall be extended progressively to nationals and companies of Member States other than the one having special relations with the country or territory in question. During the first year of application of the present Convention, the Council, voting with the prescribed majority on a proposal by the Commission, shall decide upon the means by which this shall be done, so as to achieve the gradual disappearance of all discrimination during the transitional period.

ARTICLE 9

The customs treatment applied to trade between Member States and the countries and territories shall be that provided for in Articles 133 and 134.

ARTICLE 10

While the present Convention remains in force, Member States shall apply to their trade with the countries and territories the provisions of the Section of the Treaty relating to the abolition of quantitative restrictions between Member States that they apply during the same period in their mutual relations.

ARTICLE 11

1. In each of the countries or territories where import quotas exist and one year after the entry into force of the present Convention, quotas open to States other than the one with which such country or territory has special relations, shall be converted into global quotas open without discrimination to other Member States. From the same date, these quotas shall be increased each year by the application of the provisions of Article 32 and of paragraphs 1, 2, 4, 5, 6 and 7 of Article 33 of the Treaty.

2. When the global quota for a product not on the free list represents less than 7% of the total imports into a country or territory, a quota equal to 7% of such imports shall be established, not later than one year after the entry into force of the present Convention, and shall be increased annually in accordance with the provisions referred to in paragraph 1 above.

3. In the case of certain products for which no quota exists for imports into a country or territory, the Commission shall, by way of decision, de-

termine the methods by which the quotas offered to other Member States shall be opened and increased.

ARTICLE 12

Whenever import quotas established by Member States cover both imports coming from a State having special relations with a country or territory and imports coming from that country or territory, the proportion of imports coming from countries and territories shall be the subject of a global quota based on import statistics. The said quotas shall be fixed during the first year of application of the present Convention and shall be increased in accordance with the rules referred to in Article 10.

ARTICLE 13

The provisions of Article 10 shall not debar prohibitions or restrictions on imports, exports or transit when these are justified on grounds of public morality, public order or public security, the protection of the health or life of persons or animals or the preservation of plant life, the protection of national possessions of artistic, historical or archeological value or the protection of industrial or commercial property. Nevertheless, such prohibitions or restrictions must not constitute either a means of arbitrary discrimination, or a disguised restriction on trade.

ARTICLE 14

After the date of expiration of the present Convention, and until provision has been made for association during a further period, import quotas in the countries and territories and in the Member States in respect of products originating in the countries and territories, shall remain at the level fixed for the fifth year. Arrangements regarding the right of establishment in force at the end of the fifth year shall also be maintained.

ARTICLE 15

1. Imports of unroasted coffee into Italy and the Benelux countries, and of bananas into the Federal Republic of Germany, coming from an outside country, shall have the benefit of tariff quotas under the conditions laid down in Protocols annexed to the present Convention.

2. If the Convention expires before the conclusion of a new agreement, and pending such new agreement, Member States shall have the benefit, in respect of bananas, cocoa-beans and unroasted coffee, of tariff quotas which shall be allowed entry at the rates of duty applying at the beginning of the second stage, and which shall be equal to the volume of imports coming from outside countries during the last year for which statistics are available.

Such quotas shall, if the case arises, be increased in proportion to the increase in consumption in the importing countries.

3. Member States benefiting from tariff quotas allowed entry at the rates of duty applying on the date of the entry into force of the Treaty, in virtue of the Protocols relating to imports of unroasted coffee and bananas coming

from outside countries, shall be entitled, in respect of these products, to obtain the maintenance of tariff quotas at the level reached on the date of expiration of the Convention, in place of the arrangements provided for in the preceding paragraph.

Such quotas shall, if the case arises, be increased under the conditions laid down in paragraph 2 above.

4. At the request of the States concerned, the Commission shall fix the volume of the tariff quotas referred to in the foregoing paragraphs.

ARTICLE 16

The provisions contained in Articles 1 to 8 inclusive of the present Convention shall apply to Algeria and the French overseas Departments.

ARTICLE 17

Without prejudice to the application of the provisions of Articles 14 and 15, the present Convention shall be concluded for a period of five years.

Done at Rome, March 25, 1957.

[Here follow signatures as above.]

ANNEX A

AS PROVIDED FOR IN ARTICLE 1 OF THE CONVENTION

	1st year	2nd year	3rd year	4th year	5th year	Total
Percentages	10%	12.5%	16.5%	22.5%	38.5%	100%
Countries	In millions of E.P.U. units of account					
Belgium	7	8.75	11.55	15.75	26.95	70
France	20	25	33	45	77	200
Germany	20	25	33	45	77	200
Italy	4	5	6.60	9	15.40	40
Luxembourg	0.125	0.15625	0.20625	0.28125	0.48125	1.25
Netherlands	7	8.75	11.55	15.75	26.95	70

ANNEX B

AS PROVIDED FOR IN ARTICLE 3 OF THE CONVENTION

	1st year	2nd year	3rd year	4th year	5th year	Total
Percentages	10%	12.5%	16.5%	22.5%	38.5%	100%
Overseas	In millions of E.P.U. units of account					
countries and						
territories						
of:						
Belgium	3	3.75	4.95	6.75	11.55	30
France	51.125	63.906	84.356	115.031	196.832	511.25
Italy	0.5	0.625	0.825	1.125	1.925	5
Netherlands	3.5	4.375	5.775	7.875	13.475	35

TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY (EURATOM)

[NOTE: There are reproduced below only those articles of the treaty which are peculiar to it. The articles omitted are the same as those contained in the Treaty Establishing the European Economic Community, printed above, and are indicated herein in brackets.—Ed.]

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE FEDERAL GERMAN REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS

REALISING that nuclear energy is the essential factor for ensuring the expansion and renewal of production and for enabling progress to be effected in peaceful achievement,

CONVINCED that the only way of attaining results commensurate with the productive capacity of their countries is by making a common effort forthwith,

RESOLVED to create the conditions suitable for the development of a powerful nuclear industry which will provide vast supplies of energy and lead to the modernisation of technical processes, in addition to its many applications contributing to the well-being of their peoples,

ANXIOUS to organise safe conditions in order that the life and health of the populations may not be endangered,

DESIROUS of associating other countries with them in their work and of cooperating with international organisations working for the peaceful development of atomic energy,

HAVE DECIDED to establish a European Atomic Energy Community (EURATOM) and to this end have designated as their plenipotentiaries:

[Here follow names of plenipotentiaries as listed above, p. 866.]

who, having exchanged their full powers, found in good and due form, have agreed as follows:

PART ONE. GENERAL AIMS OF THE COMMUNITY

ARTICLE 1

By the present Treaty, the High Contracting Parties establish among themselves a European Atomic Energy Community (EURATOM).

The Community's mission shall be to contribute towards raising the standard of living in Member States and towards promoting commercial exchanges with other countries by establishing the conditions necessary for the rapid development and growth of nuclear industries.

ARTICLE 2

For the accomplishment of its mission the Community shall, under the conditions specified in the present Treaty: •

- (a) develop research and ensure the dissemination of technical knowledge;
- (b) establish, standardise and supervise the application of safety precautions to protect the health of workers and of the general public;
- (c) facilitate investment and, in particular by encouraging firms to launch new projects, ensure the construction of the basic installations required for the development of nuclear energy in the Community;
- (d) ensure a regular and equitable supply of ores and nuclear fuels to all consumers in the Community;
- (e) guarantee, by suitable measures of control, that nuclear materials are not diverted to purposes other than those for which they are intended;
- (f) exercise recognised ownership rights over special fissionable materials;
- (g) assure extensive markets and access to the best technical means by establishing a common market in specialised materials and equipment, by the free movement of capital for nuclear investment and by freedom of employment for specialists within the Community;
- (h) establish with other countries and with international organisations all contacts that are calculated to further the peaceful uses of atomic energy.

ARTICLE 3

1. Responsibility for achieving the tasks entrusted to the Community shall be vested in
- an Assembly
 - a Council
 - a Commission
 - a Court of Justice.

Each of these institutions shall act within the limits of the powers conferred upon it by the present Treaty.

2. The Council and the Commission shall be assisted by an Economic and Social Committee exercising advisory functions.

PART TWO. PROVISIONS FAVOURING PROGRESS IN THE FIELD OF ATOMIC ENERGY

CHAPTER I

The Development of Research

ARTICLE 4

1. The Commission shall be responsible for promoting and facilitating nuclear research in Member States and for extending it by carrying out the Community's research and training programme.

2. The Commission shall, in these matters, operate within the field defined by the list contained in Annex I* of the present Treaty.

This list may be amended by the Council, voting by the prescribed majority on a proposal by the Commission. The latter shall consult the Scientific and Technical Committee set up under Article 134.

* Not printed here.

ARTICLE 5

In order to promote the coordination of research undertaken in Member States and to supplement such research, the Commission shall extend an invitation to Member States, individual persons or firms, either in the form of a special request addressed to a specific individual or firm, and communicated to the appropriate Member State, or in the form of a general request made public, to notify it of their programmes in the field of research mentioned in the Commission's request.

The Commission may, after giving the interested parties every opportunity to submit their own comments, express a considered opinion on each of the programmes communicated to it. At the request of the State, individual or firm communicating a programme, the Commission shall be bound to express such opinion.

By these opinions the Commission will discourage wasteful duplication and will direct research into branches which are inadequately studied. The Commission may not publish the programmes without the consent of the State, individual or firm communicating them.

The Commission shall periodically publish a list showing the fields of nuclear research which it considers inadequately studied.

The Commission may call together, for mutual consultation and exchange of information, the representatives of public and private research centres and also any experts engaged upon research in the same or allied fields.

ARTICLE 6

In order to encourage the implementation of the research programmes communicated to it, the Commission may:

(a) furnish financial aid within the framework of research contracts, but excluding subsidies;

(b) supply, either against payment or free of charge, for the purpose of implementing the programmes, raw materials or special fissionable materials at its disposal;

(c) place at the disposal of Member States, individuals or firms, either against payment or free of charge, plant, equipment or expert assistance;

(d) bring about the joint financing of programmes by the Member States, individuals or firms concerned.

ARTICLE 7

The Community's research and training programmes shall be decided upon by a unanimous vote of the Council on the proposal of the Commission, which shall consult the Scientific and Technical Committee.

The programmes shall be drawn up for a period not exceeding five years.

Funds for the implementation of these programmes shall be included each year in the research and investment budget of the Council.

The Commission shall be responsible for carrying out the programmes and shall submit an annual progress report on them to the Council.

The Commission shall keep the Economic and Social Committee informed of the broad outlines of the Community's research and training programmes.

ARTICLE 8

1. The Commission shall, after consultation with the Scientific and Technical Committee, set up a Community Nuclear Research Centre.

The Centre shall be responsible for carrying out the research programmes and any other tasks entrusted to it by the Commission.

It shall also be responsible for standardising nuclear terminology and measurements.

It shall organise a central nuclear measurements bureau.

2. For geographical or for operational reasons the work of the Centre may be carried on in separate establishments.

ARTICLE 9

1. After consulting the Economic and Social Committee, the Commission may set up schools, within the framework of the Community Nuclear Research Centre, for training specialists, particularly in the fields of prospecting for ores, producing nuclear materials of a high degree of purity, treating irradiated fuels, atomic engineering, health protection and the production and use of radioactive isotopes.

The Commission shall decide how such training shall be provided.

2. An institution at university level shall be set up. Its methods of work shall be decided by the Council voting by the prescribed majority on a proposal of the Commission.

ARTICLE 10

The Commission may conclude contracts with Member States, individuals or firms, and with outside States, international organisations or nationals of States outside the Community, for the execution of certain parts of the Community's research programme.

ARTICLE 11

The Commission shall publish the research programmes referred to in Articles 7, 8 and 10, and periodical progress reports on their execution.

CHAPTER II

The Dissemination of Information

SECTION I—INFORMATION AT THE DISPOSAL OF THE COMMUNITY

ARTICLE 12

On request addressed to the Commission, Member States, individuals and firms shall be entitled to all non-exclusive licences of patents, provi-

sionally protected claims, registered models or patent applications which are the property of the Community, so far as they are in a position effectively to exploit the inventions to which they relate.

The Commission shall, on the same conditions, grant sublicences of patents, provisionally protected claims, registered models or patent applications, when the Community holds contractual licences conferring this right.

The Commission shall grant these licences or sublicences on conditions to be settled by agreement with the licensee, and shall make available all information necessary for exploiting them. These conditions cover in particular the question of appropriate compensation and, possibly, the right of the licensee to grant sublicences to third parties, and the obligation to treat all information imparted as trade secrets.

If agreement on the conditions provided for in paragraph 3 cannot be reached, the licensee may refer the matter to the Court of Justice, with a view to the settlement of suitable conditions.

ARTICLE 13

The Commission must communicate to Member States, individuals and firms any information acquired by the Community which is not covered by the provisions of Article 12, whether acquired in the course of work on its research programme or communicated to it with the right to use it freely.

Nevertheless, the Commission may make the transmission of this information conditional on its being treated as confidential and not passed on to third parties.

Information acquired subject to restrictions upon its use and dissemination—such as “classified” information—may not be passed on save within the limits imposed by these restrictions.

SECTION II—OTHER INFORMATION

(a) Dissemination by friendly negotiation

ARTICLE 14

The Commission shall endeavour to obtain, or to have obtained, by friendly means, information of use to the Community in the pursuit of its aims, and the concession of licences to exploit patents, provisionally protected claims, registered models or patent applications relating to such information.

ARTICLE 15

The Commission shall evolve a system by which Member States, individuals and firms may make use of its services to exchange provisional or definitive results of their research so far as these are not the results of research undertaken by the Community under contract to the Commission.

This system must guarantee the confidential nature of the exchange. °

The results communicated may, however, be transmitted by the Commission to the Community Nuclear Research Centre for its information, on the understanding that such transmission confers no right of use to which the originator of the information would not have consented.

(b) *Compulsory communication to the Commission*

ARTICLE 16

1. As soon as an application for a patent or a registered model relating to specifically nuclear matters is filed with a Member State, the latter shall ask the applicant to agree that the Commission be notified of the contents of the application forthwith.

If the applicant agrees, this notification shall be made within three months of the date of the filing of the application. If the applicant does not agree, the Member State shall, within the same period, notify the Commission of the existence of the application.

The Commission may require the Member State to transmit to it the contents of an application of whose existence it has been notified.

The Commission shall make this request within a period of two months following the notification. If this period is extended, the time-limit mentioned in paragraph 6 shall be extended accordingly.

The Member State requested by the Commission for such information shall again ask the applicant's permission to inform the Commission of the contents of his application. If the applicant agrees, the information shall be supplied forthwith.

If the applicant does not agree, the Member State is nevertheless bound to supply the information to the Commission after a period of eighteen months dating from the filing of the application.

2. Member States shall undertake to notify the Commission, within eighteen months of its filing, of the existence of any unpublished application for patents or registered models which appear *prima facie* to deal with a subject that, without relating specifically to nuclear matters, is directly connected with or essential to the development of nuclear energy within the Community.

The Commission shall, at its request, be informed of the contents of the application within a period of two months.

3. Member States shall undertake to reduce to a minimum the time taken by the procedure for applications for patents and registered models relating to the subjects specified in paragraphs 1 and 2 about which the Commission has asked for information, in order that publication may follow as soon as possible.

4. The Commission must consider the above-mentioned notification as confidential. They must not serve any other purpose than that of documentation. The Commission may however make use of the inventions of which it is notified, either with the consent of the applicant or in accordance with Articles 17-23 inclusive.

5. The provisions of the present Article shall not apply if an agreement concluded with a third State or with an international organisation precludes notification.

(c) Patents granted compulsorily or as a result of arbitration

ARTICLE 17

1. In the absence of an amicable arrangement, non-exclusive licences may be granted, either compulsorily or as a result of arbitration, under the conditions laid down in Articles 18–23 inclusive:

(a) to the Community, or to Joint Enterprises entitled to them under the terms of Article 48, in respect of patents, provisionally protected claims, or registered models relating to inventions directly connected with nuclear research, so far as the granting of such licences is necessary to the pursuit of their research or essential to the functioning of their plant.

At the request of the Commission such licences shall carry the right to authorise third parties to use the invention in connection with work or orders they are executing for the Community or for Joint Enterprises.

(b) to individuals or firms which have made an application therefor to the Commission, in respect of patents, provisionally protected claims or registered models relating to inventions directly connected with, and essential to, the development of nuclear energy within the Community, provided that the following conditions are all fulfilled, namely:

- (i) that at least four years have elapsed since the filing of the application for a patent, except in the case of an invention relating to a specifically nuclear subject;
- (ii) that the needs arising from the development of nuclear energy in the territory of a Member State where an invention is protected, as the Commission understands that development, are not met, so far as that invention is concerned;
- (iii) that the patent-owner, when asked to satisfy these needs, either himself or through his licensee, has failed to do so;
- (iv) that the individuals or firms granted licences are in a position to meet these needs effectively by exploiting the patents.

Member States may not, except at the prior request of the Commission, take any coercive measure provided for under their internal laws to meet the aforesaid needs if the effect of such measure would be to limit the protection accorded to the invention.

2. A non-exclusive licence may not be granted under the conditions laid down in the previous paragraph if the owner of the patent is able to produce legitimate reasons for withholding it, particularly, for instance, that he has not had sufficient time.

3. The granting of a licence under the terms of paragraph 1 confers the right to full compensation, the amount of which shall be agreed upon between the owner of the patent, provisionally protected claim or registered model and the licensee.

4. The stipulations of the present Article shall not affect the provisions of the Paris Convention for the protection of industrial property.

ARTICLE 18

An Arbitration Committee shall be set up for the purposes stated in the present section. Its members shall be appointed and its rules laid down by the Council, voting on a proposal of the Court of Justice.

The parties may, within one month dating from the notification of a decision rendered by the Arbitration Committee, bring an appeal for a stay of proceedings before the Court of Justice. The Court may only adjudicate upon the formal regularity of the decision and on the interpretation given by the Arbitration Committee to the provisions of the present Treaty.

The final decisions of the Arbitration Committee shall have the force of *res judicata* as between the parties.

They shall have executory force under the conditions laid down in Article 164.

ARTICLE 19

If, in the absence of an amicable arrangement, the Commission intends to have a licence granted in a case provided for under Article 17, it shall notify the owner of the patent, provisionally protected claim or registered models or the applicant for the patent accordingly, giving in its notification the name of the licensee and the scope of the licence.

ARTICLE 20

The owner may, within a period of one month dating from receipt of the notification mentioned in Article 19, suggest to the Commission and, where necessary, to the third party beneficiary, that a special agreement be reached for the purpose of submitting the matter to the Arbitration Committee.

If the Commission or the third party beneficiary refuses to conclude a special agreement, the Commission may not require the Member State or its competent agencies to grant the licence, or cause it to be granted.

If, when the matter comes before it under the special agreement, the Arbitration Committee rules that the Commission's request is in conformity with the provisions of Article 17, it will give a decision, stating the grounds, to the effect that the licence is to be granted, and will determine the conditions and price thereof if the parties have not reached agreement thereon.

ARTICLE 21

If the owner of the patent does not propose to refer the matter to the Arbitration Committee, the Commission may require the Member State concerned or its competent agencies to grant the licence, or cause it to be granted.

If, after hearing the patent-owner, the Member State or its competent agencies are of the opinion that the conditions laid down in Article 17 have not been fulfilled, it will notify the Commission of its refusal to grant the licence or to cause it to be granted.

If it refuses to grant the licence or cause it to be granted or if, within four months of the request, it fails to furnish any explanation concerning the granting of the licence, the Commission may, within two months, refer the matter to the Court of Justice.

The patent-owner must be heard in the proceedings before the Court of Justice.

If the judgment of the Court establishes that the conditions laid down in Article 17 have been fulfilled, the Member State concerned, or its competent agencies, shall be bound to take the measures entailed by the execution of the judgment.

ARTICLE 22

1. If the owner of the patent, provisionally protected claim or registered model and the licensee have not agreed on the amount of compensation due, they may conclude a special agreement for the purpose of submitting the matter to the Arbitration Committee.

Thereby they shall waive all right of appeal except as provided for under Article 18.

2. If the beneficiary refuses to conclude this special agreement, the licence which he holds shall be deemed invalid.

If the owner refuses to conclude such special agreement, the compensation provided for under the present Article shall be determined by the competent national agencies.

ARTICLE 23

The decisions of the Arbitration Committee or of the competent national agencies shall be subject to revision in respect of the conditions of the licence after the expiry of a period of one year and insofar as new facts justify such revision.

Responsibility for carrying out the revision shall rest with the authorities deciding thereon.

SECTION III—PROVISIONS FOR SECRECY

ARTICLE 24

Information which is acquired by the Community in carrying out its research programme and which might be damaging to the defence interests of one or more Member States if it were divulged shall be subject to secrecy under the following conditions:

1. Security regulations adopted by the Council on the proposal of the Commission shall, in accordance with the provisions of the present Article, determine the various classifications of secret information applicable and the security measures to be enforced in each case.

2. The Commission shall provisionally subject to the classification imposed for this purpose by the security regulations all information the disclosure of which it considers may be damaging to the defence interests of one or more Member States.

It shall immediately transmit such information to Member States and they shall be bound provisionally to ensure its secrecy on the same conditions.

Member States shall within a period of three months inform the Commission whether they wish to maintain the secret classification provisionally applied, to substitute another classification for it or to remove the information from the secret list.

At the end of this period the strictest "secret" classification requested shall be applied, and the Commission shall notify Member States thereof.

At the request of the Commission or of a Member State the Council may by a unanimous vote at any time apply a different "secret" classification or remove the information from the secret list. The Council shall consult the Commission before deciding on a request from a Member State.

3. The provisions of Articles 12 and 13 shall not apply to information classified as secret.

However, subject to the observance of the security measures applicable,

(a) the information referred to in Articles 12 and 13 may be disclosed by the Commission

(i) to a Joint Enterprise

(ii) to an individual or firm other than a Joint Enterprise, through the instrumentality of the Member State on whose territory the operations of the said individual or firm are conducted.

(b) the information referred to in Article 13 may be communicated by a Member State to an individual or firm, other than a Joint Enterprise, conducting activities in the territory of that State, on condition that the Commission is notified of the transmission of the information.

Moreover, every Member State has the right to require the Commission to grant a licence in conformity with Article 12 for its own needs or for the needs of an individual or firm conducting activities in the territory of that State.

ARTICLE 25

1. A Member State communicating the existence or the contents of an application for a patent or registered model relating to a subject referred to in Article 16, paragraph 1 or 2, shall, where appropriate, state the need, for defence reasons, to apply any particular classification of secrecy, mentioning the probable duration of the period of secrecy.

The Commission shall pass on to other Member States all communications received in execution of the previous paragraph. The Commission and Member States shall respect the measures entailed under the security regulations which, by the classification of secrecy, the State of origin has requested.

2. The Commission may also transmit these communications to Joint Enterprises or, through a Member State, to an individual or firm, other than a Joint Enterprise, carrying on activities in the territories of that State.

Inventions which are the subject of the applications referred to in paragraph 1 may be utilised only with the consent of the applicant or in accordance with the provisions of Articles 17-23 inclusive.

The communication or, where such is the case, the utilisation of inventions as referred to in the present paragraph shall be subject to the measures entailed, under the security regulations, by the classification of secrecy which the State of origin has requested.

Such communication and such utilisation shall, in all cases, be subject to the consent of the State of origin, which may not refuse its consent except for defence reasons.

3. At the request of the Commission or of a Member State the Council may, by a unanimous vote, at any time apply a different classification of secrecy or remove the invention from the secret list. The Council shall consult the Commission before deciding on a Member State's request.

ARTICLE 26

1. When information forming the subject of a patent, patent application, provisionally protected claim or registered model is classified as secret in accordance with the provisions of Articles 24 and 25, the States requesting such classification may not refuse to allow corresponding applications to be filed in the other Member States.

Each Member State shall take the necessary measures to ensure secrecy for all such applications and claims, in accordance with the procedure prescribed by its domestic laws and regulations.

2. No patent applications may be filed outside Member States in respect of information classified as secret in conformity with Article 24 except with the consent of all these Member States. If these States do not make their attitude known, their consent shall be assumed after the expiry of a period of six months following the date of the communication of the information by the Commission to Member States.

ARTICLE 27

Compensation for injury suffered by an applicant as a result of the classification of his invention as secret for defence reasons, shall be subject to the provisions of the domestic laws of Member States and shall be the responsibility of the State which requested secrecy or applied for an increase in the degree or duration of secrecy, or prevented the lodging of a patent application outside the Community.

In any case in which two or more Member States have procured an increase in the degree or duration of secrecy or have prevented the filing of an application outside the Community, they shall jointly pay compensation for the resultant injury.

The Community cannot claim any compensation under the terms of the present Article.

SECTION IV—SPECIAL PROVISIONS

ARTICLE 28

If applications for patents or registered models not yet published, or for patents or registered models classified as secret for defence reasons, are

improperly utilised or come to the knowledge of an unauthorised third party as a result of their communication to the Commission, the Community shall make good any injury suffered by the persons concerned.

In the event of such persons having the right to take action against third parties, this right shall be transferred to the Community, without prejudice to its own claims against the author of the injury, so far as it has borne the cost of making good the injury suffered. The right of the Community itself to take action against the author of the injury, in accordance with the general regulations in force, remains intact.

ARTICLE 29

Any agreement or contract for the purpose of exchanging scientific or industrial information on nuclear matters between a Member State, an individual or firm and any outside State, international organisation or national of an outside State must, if it requires the signature of a State exercising sovereign authority, be concluded by the Commission.

Nevertheless, the Commission may authorise a Member State, an individual or a firm to conclude such agreements, on conditions it deems proper, subject to the application of the provisions of Articles 103 and 104.

CHAPTER III

Health Precautions

ARTICLE 30

The Community shall establish certain basic standards for the protection of the health of workers and of the general population against the dangers arising from ionising radiation.

These basic standards shall be as follows:

- (a) the maximum permissible doses compatible with adequate safety;
- (b) the maximum permissible degree of exposure and contamination;
- (c) the basic principle governing the medical supervision of workers.

ARTICLE 31

The basic standards shall be worked out by the Commission, after consulting a group of acknowledged experts appointed by the Scientific and Technical Committee from among the scientific experts, especially public health experts, of the Member States. The Commission shall request the opinion of the Economic and Social Committee on the basic standards thus worked out.

On the proposal of the Commission, which shall forward to it the opinions it has received from the Committees, the Council, after consulting the Assembly, shall determine the basic standards by the prescribed majority.

ARTICLE 32

At the request of the Commission or of a Member State, the basic standards may be revised or added to, according to the procedure laid down in Article 31.

The Commission shall be bound to take the necessary action for the examination of any such request made by a Member State.

ARTICLE 33

Each Member State shall adopt the statutory and administrative provisions required to ensure adherence to the basic standards determined and shall also take the necessary measures with regard to instruction, education and professional training.

The Commission shall make any recommendations that may be required to ensure concordance between the measures taken to this effect in the Member States.

With this object, the Member States shall notify the Commission of all measures of this nature that apply when the present Treaty comes into force and also any similar measures that they may subsequently contemplate.

Any recommendations by the Commission in respect of measures in contemplation shall be made within a period of three months from the date of notification of such measures.

ARTICLE 34

Any Member State in whose territory experiments of a particularly dangerous nature are to take place shall take additional health precautions, concerning which it shall first elicit the opinion of the Commission.

The approval of the Commission shall be required when the effects of such experiments are likely to affect the territory of other Member States.

ARTICLE 35

Each Member State shall set up the installations required to maintain permanent supervision over the radioactive content of the atmosphere, the water and the soil and keep a check on adherence to the basic standards.

The Commission shall have the right of access to such supervisory installations and may test their operation and efficiency.

ARTICLE 36

The competent authorities shall report regularly to the Commission on the supervision provided for in Article 35, in order that the Commission may be kept informed of the level of radioactivity likely to affect the population.

ARTICLE 37

Each Member State shall submit to the Commission the outline of any plans for the disposal of radioactive waste of all kinds, to enable the Commission to decide whether the implementation of such plans is likely to involve radioactive contamination of the water, soil or atmosphere of another Member State.

The Commission, after consulting the group of experts referred to in Article 31, shall give its views thereon within six months.

ARTICLE 38

The Commission shall make any necessary recommendations to the Member States regarding the radioactive content of the atmosphere, water or soil.

In urgent cases, the Commission shall issue a directive requiring the Member State in question to take, within a period fixed by the Commission, all measures necessary to prevent the basic standards from being exceeded and to ensure observance of the regulations.

If the State in question does not comply with the Commission's directive within the prescribed period, the Commission or any Member State concerned may, notwithstanding Articles 141 and 142, bring the matter before the Court of Justice without further delay.

ARTICLE 39

As soon as the Community Centre for Nuclear Research has been set up, the Commission shall establish within it a Section for documentation and study in connection with health precautions.

It shall be the particular task of this Section to collect the documentation and information referred to in Articles 33, 37 and 38 and to assist the Commission in discharging duties laid upon it by the present Section of the Treaty.

CHAPTER IV

Investment

ARTICLE 40

In order to encourage action by individuals and firms and to facilitate the coordinated development of investment by them in the atomic field, the Commission shall, from time to time, publish programmes indicating, in particular, the purposes for which the production of atomic energy is necessary and the various types of investment required for the achievement of those purposes.

The Commission shall request the opinion of the Economic and Social Committee on such programmes prior to their publication.

ARTICLE 41

Individuals and firms belonging to the branches of industry specified in Annex II * to the present Treaty shall notify the Commission of any of their investment plans relating to new plants, replacements or conversions which correspond in type or scope to the criteria laid down by the Council on the proposal of the Commission.

The list of branches of industry referred to above may be amended by the Council voting with the prescribed majority, on the proposal of the Commission, which shall previously have requested the opinion of the Economic and Social Committee.

• * Not printed here.

ARTICLE 42

The plans referred to in Article 41 shall be notified to the Commission, and also, for information, to the Member State concerned, not less than three months before the conclusion of the first supply contracts or, if the work is to be carried out by the firm itself, not less than three months before such work is begun.

Acting on the proposal of the Commission, the Council may alter this time-limit.

ARTICLE 43

The Commission shall discuss with individuals or firms all aspects of any investment plans that correspond to the aims of the present Treaty.

It shall communicate its views thereon to the Member State concerned.

ARTICLE 44

With the agreement of the Member States and of the individuals or firms concerned, the Commission may make public any investment plans notified to it.

CHAPTER V

Joint Enterprises

ARTICLE 45

Undertakings of outstanding importance to the development of a nuclear industry in the Community may be established as Joint Enterprises within the meaning of the present Treaty, in accordance with the provisions of the following Articles.

ARTICLE 46

1. Any plan for the establishment of a Joint Enterprise, whether emanating from the Commission, a Member State or any other source, shall be the subject of an enquiry by the Commission.

For this purpose, the Commission shall consult Member States and any public or private bodies which it considers capable of providing useful information.

2. The Commission shall transmit to the Council any plan put forward for the establishment of a Joint Enterprise, together with its own reasoned views thereon.

If the Commission gives a favourable opinion as to the need for the Joint Enterprise in question, it shall submit proposals to the Council on the following points:

- (a) location;
- (b) statutes;
- (c) volume and rate of financing;
- (d) whether or not the Community should contribute towards the financing of the Joint Enterprise;

(e) whether or not any State outside the Community, any international organisation or any national of a State outside the Community should have a share in the financing or management of the Joint Enterprise;

(f) whether or not the Joint Enterprise should enjoy any or all of the advantages specified in Annex III * to this Treaty.

The Commission shall attach a detailed report on the plan as a whole.

ARTICLE 47

On receipt of such proposals and report from the Commission, the Council may request the Commission to supply such additional information or to carry out such additional enquiries as the Council may deem necessary.

If the Council, expressing its view by a vote with the prescribed majority, considers that a plan which the Commission has transmitted with an unfavourable opinion ought nevertheless to be carried out, the Commission shall be bound to submit to the Council the proposals and the detailed report provided for in Article 46.

In the case of a favourable report by the Commission, or in the case provided for in the preceding paragraph, the Council shall take a decision on each of the Commission's proposals by a vote with the prescribed majority.

Nevertheless, a unanimous vote of the Council shall be required with regard to:

(a) participation by the Community in the financing of the Joint Enterprise;

(b) participation by a State outside the Community, an international organisation or a national of a State outside the Community in the financing or management of the Joint Enterprise.

ARTICLE 48

Acting on the proposal of the Commission and by a unanimous vote, the Council may make applicable to each Joint Enterprise any or all of the advantages specified in Annex III * to the present Treaty, of which Member States are required to ensure the application each insofar as it is respectively concerned.

The Council may, following the same procedure, determine the conditions by which the granting of such advantages shall be governed.

ARTICLE 49

The establishment of a Joint Enterprise shall be pursuant to a decision of the Council.

Each Joint Enterprise shall be a legal entity.

Each Joint Enterprise shall enjoy, in each of the Member States, the widest legal capacity accorded to legal entities under the respective internal laws of those States, including, in particular, the right to acquire and to dispose of movable and immovable property and to be a party to legal proceedings.

* Not printed here.

Unless otherwise provided in the present Treaty or in its own Statutes, each Joint Enterprise shall be subject to the regulations applying to industrial or commercial undertakings. Its Statutes may make secondary provision for the invocation of the internal laws of Member States.

Subject to the powers granted to the Court of Justice under the present Treaty, the appropriate national tribunals shall be competent in respect of any litigation concerning Joint Enterprises.

ARTICLE 50

Should the Statutes of a Joint Enterprise require to be amended, this shall be done in accordance with the specific provisions embodied for this purpose in the said Statutes.

Nevertheless, such amendments shall not come into force until they have received the approval of the Council, given under the same conditions as are prescribed in Article 47 and on the proposal of the Commission.

ARTICLE 51

Until the setting up of the bodies entrusted with the operation of Joint Enterprises, the Commission shall be responsible for the carrying out of all decisions of the Council concerning the establishment of such Enterprises.

CHAPTER VI

Supplies

ARTICLE 52

1. The supply of ores, raw materials and special fissionable materials shall be ensured in accordance with the provisions of the present Section on the principle of equal access to resources and by the pursuit of a common supply policy.

2. To this end and under the conditions provided for in the present Section:

(a) all practices designed to ensure a privileged position for certain users shall be forbidden;

(b) an Agency shall be set up, with a right of option on all ores, raw materials and special fissionable materials produced in the territory of Member States, and with the exclusive right of concluding contracts for the supply of ores, raw materials and special fissionable materials originating inside or outside the Community.

The Agency shall not discriminate between users on the grounds of the use they intend to make of the supplies requested, unless such use is illicit or is found to be contrary to conditions upon the delivery in question laid down by suppliers outside the Community.

SECTION I—THE AGENCY

ARTICLE 53

The Agency shall be placed under the control of the Commission, which shall issue directives to it, exercise a right of veto over its decisions and appoint its Director-General and Deputy Director-General.

Any act of the Agency, whether implicit or explicit, in the exercise of its right of option or its exclusive right to conclude supply contracts, may be referred by the parties concerned to the Commission, which shall take a decision thereon within a period of one month.

ARTICLE 54

The Agency shall enjoy legal personality and financial independence. The Council shall, by prescribed majority, upon proposal of the Commission, lay down the statutes for the Agency.

The Statutes may be amended by the same formalities.

The Statutes shall determine the amount of the Agency's capital and the methods by which it shall be subscribed. The greater part of the capital shall in any case belong to the Community and to the Member States in proportions to be decided by agreement between the latter.

The Statutes shall determine the ways and means of the commercial management of the Agency. They may provide for the payment of a tax on all transactions in order to meet the working expenses of the Agency.

ARTICLE 55

The Member States shall communicate or cause to be communicated to the Agency all information necessary to the exercise of its right of option and exclusive right to conclude supply contracts.

ARTICLE 56

The Member States shall guarantee freedom of operation to the Agency in their respective territories.

They may set up one or more bodies empowered to represent, in relations with the Agency, the producers and users of non-European territories under their jurisdiction.

SECTION II—ORES, RAW MATERIALS AND SPECIAL FISSIONABLE MATERIALS ORIGINATING INSIDE THE COMMUNITY

ARTICLE 57

1. The Agency's right of option shall cover:

- (a) the acquisition of user and consumer rights over materials owned by the Community under the provisions of Chapter VIII;
- (b) the acquisition of owner's rights in all other cases.

2. The Agency shall exercise its right of option through the conclusion of contracts with the producers of ores, raw materials and special fissionable materials.

Subject to the provisions of Articles 58, 62 and 63, every producer is bound to offer to the Agency any ores, raw materials or special fissionable materials that he may produce inside the territory of Member States before himself using, transferring or stockpiling such ores or materials.

ARTICLE 58

When a single producer is responsible for several stages of production, from the extraction of the ore up to and including the production of the metal, he may offer his product to the Agency at any stage of production that he chooses.

The same shall apply to firms having mutual arrangements with each other, provided always that such arrangements have been duly notified to the Commission and discussed with it according to the procedure laid down in Articles 43 and 44.

ARTICLE 59

If the Agency does not exercise its right of option over the whole or part of his production, a producer:

(a) may have the ores, raw materials or special fissionable materials processed, either by his own means or under contract, provided always that he offers the product of such processing to the Agency; and

(b) shall be authorised, by decision of the Commission, to dispose of his available production outside the Community, provided always that he offers it on terms no more favourable than those of his prior offer to the Agency. Nevertheless, the export of special fissionable materials may be carried out only by the Agency, in accordance with the provisions of Article 62.

The Commission may not grant the authorisation referred to above unless the persons to whom delivery is to be made are such as to offer a complete guarantee that the overall interests of the Community will be respected, or if the clauses and conditions of the contracts concerned are contrary to the aims of the present Treaty.

ARTICLE 60

Potential users shall periodically inform the Agency of their requirements in the matter of supplies, specifying the quantities, physical and chemical properties, place of origin, use proposed, delivery dates and prices, which are to appear in the terms and conditions of the supply contract that they wish to conclude.

Similarly, producers shall notify the Agency of offers they are in a position to make, with full particulars including the length of contract necessary to enable them to draw up their production programmes. Except with the agreement of the Commission, such contracts shall not exceed ten years in duration.

The Agency shall inform all potential users of the offers and of the volume of requests it has received and shall invite them to place their orders by a given date.

When all the orders have come in, the Agency shall make known the terms on which it can fulfill them.

If the Agency is unable completely to fulfill the orders received, it shall allocate the supplies available in proportion to the orders in respect of each offer, subject to the provisions of Articles 68 and 69.

Agency regulations, to be submitted for the approval of the Community shall determine the way in which offers and orders shall be counterbalanced.

ARTICLE 61

The Agency shall be obliged to fulfill every order received unless there are legal or material obstacles to their execution.

Subject to compliance with the provisions of Article 52, the Agency shall require users to make a suitable advance payment on the conclusion of a contract, either as security or to facilitate its own long-term commitment toward producers that are necessary to the execution of the order.

ARTICLE 62

1. The Agency shall exercise its right of option over special fissionable materials produced in the territory of Member States in order

(a) to meet the demands of users inside the Community under the conditions laid down in Article 60; or

(b) to build up its own stocks of such materials; or

(c) to export such materials, subject to the authorisation of the Commission given in accordance with the provisions of the sub-paragraph (b) of Article 59.

2. Nevertheless, while remaining subject to the provisions of Section II, these materials and their fertile residues shall be left in the possession of the producer, for him

(a) to build up his own stocks, subject to the authorisation of the Agency; or

(b) to make use of such materials within the limits of his requirements or

(c) to make them available, within the limits of their requirements, to firms inside the Community with which he has a direct agreement for the purpose of carrying out a programme that has been duly notified to the Commission, provided always that such agreement does not, in intent or in fact, restrict production, technical development or investment, or create inequitable distinctions between users within the Community.

3. The provisions of paragraph (1) (a) of Article 89 shall apply to special fissionable materials produced in the territories of Member States in respect of which the Agency shall not have exercised its right of option.

ARTICLE 63

Any ores, raw materials or special fissionable materials produced by Enterprises shall be assigned to users in accordance with the statutory or conventional regulations governing such Enterprises.

SECTION III—ORES, RAW MATERIALS AND SPECIAL FISSIONABLE MATERIALS FROM OUTSIDE THE COMMUNITY

ARTICLE 64

• Within the framework of any agreements that may be reached between the Community and an outside State or an international organisation

subject to the exceptions provided for in the present Treaty, the Agency shall have the exclusive right to conclude agreements or conventions having as their main object the supply of ores, raw materials or special fissionable materials from outside the Community.

ARTICLE 65

Article 60 shall apply to requests from users and to contracts concluded between users and the Agency for the supply of ores, raw materials or special fissionable materials from outside the Community.

Nevertheless, the Agency may decide as between different geographical sources of supply, provided always that it ensures for the user conditions at least as favourable as those specified in his order.

ARTICLE 66

If, as the result of an application from the users concerned, the Commission finds that the Agency is unable to fulfill an order for supplies, either in whole or in part, within a reasonable period or is able to fulfill it only at an exorbitant price, users shall be entitled to conclude direct contracts for supplies from outside the Community, provided always that such contracts correspond strictly to the users' needs as specified in their order.

The right to conclude direct contracts shall be granted for a period of one year and shall be renewable if the situation originally justifying it continues to be the same.

Users availing themselves of the right provided for in the present Article shall notify the Commission of any direct contracts they may plan to conclude. The Commission may, within a period of one month, oppose the conclusion of such contracts if they are contrary to the aims of the present Treaty.

SECTION IV—PRICES

ARTICLE 67

Subject to the exceptions provided for in the present Treaty, prices shall be regulated by the interplay of supply and demand, under the conditions laid down in Article 60, which must not be infringed by the national regulations of Member States.

ARTICLE 68

All price manipulations designed to ensure a privileged position for certain users, contrary to the principle of equal access embodied in the provisions of the present Chapter, shall be forbidden.

If the Agency determines the existence of such practices it shall report them to the Commission.

If the Commission considers that the Agency's determination is well founded it may, in case of a disagreement over prices, restore the latter to a level compatible with the principle of equal access.

ARTICLE 69

On the proposal of the Commission and by a unanimous vote the Council may fix prices.

When, in accordance with the provisions of Article 60, the Agency determines the conditions under which orders may be fulfilled, it may put forward to such users as have placed orders proposals for the equalisation of prices.

SECTION V—PROVISIONS CONCERNING SUPPLY POLICY

ARTICLE 70

Within the limits laid down in the Community budget the Commission may participate financially, on terms specified by itself, in any prospecting undertaken in the territories of Member States.

The Commission may make recommendations to Member States with a view to developing prospecting for and exploitation of mineral deposits.

Member States shall each year submit a report to the Commission on the development of prospecting and production, the existence of probable reserves and the amount of mining investment carried out or in contemplation in their territory. Such reports shall be submitted to the Council together with the views of the Commission, with special regard to the action taken by Member States on recommendations made to them as provided in the previous paragraph.

If the Council, by prescribed majority, on information received from the Commission, finds that, in spite of what appear to be economically justifiable long-term prospects, the measures taken for prospecting and developing the exploitation of mineral deposits continue to be obviously inadequate, the Member State concerned shall, so long as it has not remedied this state of affairs, be deemed to have relinquished, both for itself and for its nationals, the right of equal access to the other internal resources of the Community.

ARTICLE 71

The Commission shall make any necessary recommendations to Member States concerning their fiscal or mining regulations.

ARTICLE 72

The Agency may, from the quantities available inside or outside the Community, build up the commercial stocks necessary to facilitate the Community's supplies or current deliveries.

The Commission may decide to build up reserve stocks. The means of financing such stockpiling shall require the approval of a prescribed majority of the Council voting on a proposal by the Commission.

SECTION VI—SPECIAL PROVISIONS

ARTICLE 73

If an agreement or a convention between a Member State, an individual or a firm, of the one part, and an outside State, an international organisa-

tion or a national of an outside State, of the other part, includes any provisions relating to the delivery of products coming within the control of the Agency, the previous agreement of the Commission shall be required for the conclusion or renewal of such agreement or convention as far as concerns the delivery of such products.

ARTICLE 74

The Commission may exempt from the application of the provisions of the present Section the transfer, importation or exportation of small quantities of ores, raw materials or special fissionable materials such as are commonly used for purposes of research.

Any transfer, importation or exportation carried out in virtue of this provision shall be notified to the Agency.

ARTICLE 75

The provisions of the present Chapter shall not apply to commitments covering the treatment, transformation or processing of ores, raw materials or special fissionable materials undertaken between:

(a) individuals or firms, in cases where the materials treated, transformed or processed are subsequently to be returned to the individual or firm whence they originally came;

(b) an individual or firm and an international organisation or national of an outside State, in cases where the materials, after being treated, transformed or processed outside the Community are subsequently to be returned to the individual or firm whence they originally came;

(c) an individual or firm and an international organisation or national of an outside State, in cases where the materials, after being treated, transformed or processed inside the Community, are subsequently either to be returned to the organisation or national whence they originally came or are sent to any other consignee, also outside the Community, specified by such organisation or national.

Nevertheless, the individuals or firms concerned shall notify the Agency of the existence of any such commitments and also, upon signature of the contract, of the amounts of materials involved. The Commission may oppose the commitments referred to in paragraph (b) above if it considers that the transformation or processing involved cannot be carried out efficiently, with due regard for security, and without loss of material to the detriment of the Community.

All materials covered by such commitments shall, while they are within the territory of Member States, be subject to the security measures provided for in Chapter VII. Nevertheless, the provisions of Chapter VIII shall not apply to any special fissionable materials covered by the type of undertaking referred to in paragraph (c) above.

ARTICLE 76

The provisions of the present Section may be amended by the Council, at the request of a Member State or of the Commission, in particular in

cases where unforeseen circumstances have created a general shortage. The Council shall take its decision by a unanimous vote, on a proposal by the Commission and after consulting the Assembly. The Commission is bound to take steps to examine any such request brought forward by a Member State.

At the end of a period of seven years from the entry into force of the present Treaty this body of provisions may be confirmed by the Council. In the absence of such confirmation, new provisions dealing with the subject-matter of the present Section shall be decided upon in accordance with the procedure prescribed in the previous paragraph.

CHAPTER VII

Security Control

ARTICLE 77

Under the conditions laid down in the present Chapter the Commission must ensure that in the territories of Member States

(a) ores, raw materials and special fissionable materials are not diverted from their intended use as stated by the users,

(b) the arrangements made for their supply and any special undertaking concerning control measures entered into by the Community in an agreement concluded with an outside State or an international organisation are observed.

ARTICLE 78

Anyone setting up or exploiting a plant for the production, separation or any utilisation of raw materials or special fissionable materials, or for the processing of irradiated nuclear fuel, must make a declaration to the Commission setting out the basic technical characteristics of the plant, so far as such information is essential to the achievement of the purposes stated in Article 77.

The Commission must approve the processes to be used for the chemical treatment of irradiated material, so far as is necessary for the achievement of the purposes stated in Article 77.

ARTICLE 79

The Commission shall require statements of all operations to be kept and submitted in order to make possible accounting in respect of the ores, raw materials and special fissionable materials used or produced. The same requirement shall apply to the transport of raw materials and special fissionable materials.

Those subject to such control must inform the authorities of the Member State concerned of communications they make to the Commission under Article 78 and paragraph 1 of the present Article.

The nature and scope of the obligations referred to in paragraph 1 of the present Article shall be the subject of regulations to be drawn up by the Commission and submitted for the approval of the Council.

ARTICLE 80

The Commission may require that all surplus special fissionable materials recovered or obtained as by-products, which are not actually in use or ready for use, be deposited with the Agency or placed in storage premises which are or can be controlled by the Commission.

The special fissionable materials thus deposited shall be returned to the owners immediately on request.

ARTICLE 81

The Commission may send inspectors into the territories of Member States. Before the first visit of inspection in the territories of any State, it shall consult the Member State concerned with regard to this visit and all future visits to its territory by this inspector.

On presentation of their credentials inspectors shall at all times have access to any premises, information, and persons professionally concerned with any products, equipment or plant subject to control under the provisions of the present Section, to the extent necessary for verification of ores, raw materials and special fissionable materials, and to ensure observance of the provisions laid down in Article 77.

At the request of the State concerned, the inspectors appointed by the Commission shall be accompanied by representatives of the authorities of that State, provided that the inspectors are not thereby delayed or otherwise hampered in the exercise of their functions.

In case of opposition to the carrying out of inspection the Commission shall apply to the President of the Court of Justice for a warrant to enforce the carrying out of the inspection. The President shall give a decision within three days.

If delay involves danger, the Commission may itself issue a written order, in the form of a decision, that the inspection be carried out. Such order must be submitted without delay to the President of the Court of Justice for *post facto* approval.

After service of the warrant or decision, the national authorities of the State concerned shall ensure access by the inspectors to the premises named in the warrant or decision.

ARTICLE 82

Inspectors shall be recruited by the Commission.

It shall be their duty to call for and examine the statements of account mentioned in Article 79. They shall report any violation to the Commission.

The Commission may issue a directive enjoining the Member State in question to take within a prescribed period all measures necessary to put an end to the violation reported and shall inform the Council thereof.

If the Member State does not comply with the Commission's directive within the time specified, the Commission or any Member State concerned may, notwithstanding Articles 141 and 142, immediately bring the matter before the Court of Justice.

ARTICLE 83

1. In the event of any infringement of the obligations imposed on individuals or firms under the provisions of the present Chapter, penalties may be inflicted upon them by the Commission.

These penalties, in order of gravity, shall be as follows:

- (a) a warning;
- (b) the withdrawal of special advantages, such as financial or technical assistance;
- (c) the placing of the firm, for a maximum period of four months, under the administration of an individual or board appointed jointly by the Commission and the State to which the enterprise belongs;
- (d) the complete or partial withdrawal of raw materials or special fissionable materials.

2. Decisions taken by the Commission which require the delivery of raw materials or special fissionable materials in execution of the foregoing paragraph shall be enforceable. They may be enforced in the territories of Member States under the conditions laid down in Article 164.

Notwithstanding the provisions of Article 157, appeals brought before the Court of Justice against decisions taken by the Commission inflicting penalties provided for in the preceding paragraph shall stay proceedings. Nevertheless, the Court may, at the request of the Commission or of any Member State concerned, order that the decision be enforced immediately.

The protection of interests which may have suffered must be guaranteed by an appropriate legal procedure.

3. The Commission may make recommendations to Member States concerning laws and regulations to ensure the observance in their territories of the obligations resulting from the provisions of the present Section.

4. Member States shall be required to ensure the enforcement of penalties and, where applicable, the payment of compensation by those responsible for infringements.

ARTICLE 84

In the exercise of control no discrimination shall be made on the grounds of the purpose for which ores, raw materials and special fissionable materials are intended.

The field of action, methods of control and powers of the bodies responsible for control shall be limited to what is required to achieve the aims set forth in the present Section.

Control shall not extend to materials intended for the purposes of defence which are being specially processed for such purposes or which, after being processed, are, in accordance with an operational plan, deposited or stocked in a military establishment.

ARTICLE 85

Should new circumstances so demand, the methods of applying the control measures provided for in the present Section may, at the request of a Member State or of the Commission, be amended by the Council, voting unanimously on the proposal of the Commission, and after consultation

with the Assembly. The Commission shall be responsible for taking the necessary steps to examine any such request made by a Member State.

CHAPTER VIII

System of Ownership

ARTICLE 86

Special fissionable materials shall be the property of the Community.

The Community's proprietary right shall extend to all special fissionable materials produced or imported by a Member State, individual or firm and subject to the security measures laid down in Chapter VII.

ARTICLE 87

Member States, individuals or firms shall have the fullest right to the use and consumption of special fissionable materials of which they have become duly possessed, subject to the obligations imposed on them by the provisions of the present Treaty, particularly as regards security measures, the right of option enjoyed by the Agency and the protection of health.

ARTICLE 88

The Agency shall keep, on behalf of the Community, a special account, called "Financial Account of Special Fissionable Materials."

ARTICLE 89

1. The Financial Account of Special Fissionable Materials:

(a) shall credit the Community, and debit the beneficiary Member State, individual or firm, with the value of special fissionable materials left or put at the disposal of such State, individual or firm;

(b) shall debit the Community, and credit the contributory Member State, individual or firm, with the value of special fissionable materials produced or imported by such State, individual or firm and becoming the property of the Community. A similar entry shall be made in the account whenever a Member State, individual or firm delivers back to the Community special fissionable materials previously left or put at the disposal of such State, individual or firm.

2. Fluctuations of value affecting the quantities of special fissionable materials shall be so entered in the accounts that they cannot occasion any loss or gain to the Community. Any losses or gains shall accrue to the holders.

3. Balances resulting from the above transactions shall be payable immediately on request of the creditor.

4. For the purposes of the present Section, the Agency shall be regarded as a firm in respect of transactions effected on its own account.

ARTICLE 90

Should new circumstances so require, the provisions of the present Chapter concerning the Community's right of ownership may, on the motion of

a Member State or of the Commission, be modified by the Council, voting unanimously on a proposal by the Commission and after consulting the Assembly. The Commission must take the necessary steps to examine any request made by a Member State.

ARTICLE 91

The system of ownership applicable to all objects, materials and goods not belonging to the Community under the terms of the present Chapter shall be determined by the laws of each Member State.

CHAPTER IX

The Common Nuclear Market

ARTICLE 92

The provisions of the present Chapter shall apply to the goods and products listed in Annex IV * to the present Treaty.

These lists may be amended, at the request of the Commission or of a Member State, by the Council, voting on a proposal by the Commission.

ARTICLE 93

Within a year of the entry into force of the present Treaty the Member States shall abolish, as between themselves, all import and export customs duties or equivalent taxes and all quantitative restrictions on imports or exports, in respect of:

(a) products mentioned in Lists A¹ and A²;

(b) products mentioned in List B so far as they are subject to a common tariff when imported from outside the Community, provided they are covered by a certificate issued by the Commission to the effect that they are intended for nuclear purposes.

Nevertheless, non-European territories under the jurisdiction of a Member State may continue to levy import or export duties or equivalent taxes of a purely fiscal nature. There shall be no discrimination as between the State concerned and other Member States in respect either of the level or of the methods of application of such duties and taxes.

ARTICLE 94

The Member States shall establish a common customs tariff for products from outside the Community, as follows:

(a) the level of the common customs tariff applicable to products mentioned in List A¹ shall be that of the lowest tariff in force on January 1, 1957, in any Member State;

(b) the Commission shall take all necessary measures for the opening of negotiations between Member States with regard to the products mentioned in List A², within three months from the entry into force of the present Treaty. Should it prove impossible, in the case of certain of these

* Not printed here.

products, to reach agreement before the end of the first year following the entry into force of the present Treaty, the Council shall, on the proposal of the Commission and by the prescribed majority, fix the level of the duties of the common customs tariff to be applied;

(c) the common customs tariff on products mentioned in Lists A¹ and A² shall be applicable as from the end of the first year following the entry into force of the present Treaty.

ARTICLE 95

The Council, on the proposal of the Commission and by a unanimous vote, may decide upon an earlier application of the common customs tariff to products mentioned in List B, in cases where such earlier application would be likely to contribute towards atomic development within the Community.

ARTICLE 96

The Member States shall abolish all restrictions based on nationality, placed upon the free access by nationals of any of the Member States to skilled employment in the nuclear field, subject to such limitations as may be imposed by the basic requirements of public order, public safety and health.

After consulting the Assembly, the Council may, by the prescribed majority and on the proposal of the Commission, which shall previously have taken the views of the Economic and Social Committee, issue directives as to the methods of application of the present Article.

ARTICLE 97

No restrictions based on nationality may be applied to individuals, corporations, or public or private bodies coming within the jurisdiction of a Member State and desiring to participate in the construction of an atomic plant, whether for research or production, inside the Community.

ARTICLE 98

The Member States shall take all necessary measures to facilitate the conclusion of insurance contracts against atomic risks.

Within a period of two years from the entry into force of the present Treaty the Council shall, after consulting the Assembly, adopt by the prescribed majority and on the proposal of the Commission, which shall previously have requested the advice of the Economic and Social Committee, directives as to the methods of application of the present Article.

ARTICLE 99

The Committee may make any recommendations calculated to facilitate movements of capital designed to finance the types of production listed in Annex II to the present Treaty.

ARTICLE 100

Each Member State undertakes to authorise, in the currency of the Member State in which the creditor or the beneficiary resides, payments necessitated by the exchange of goods, services or capital, and also transfers of capital and of wages to the extent to which the movement of goods, services, capital and persons is freed as between Member States in virtue of the present Treaty.

CHAPTER IX

External Relations

ARTICLE 101

Within the limits of the powers conferred upon it, the Community may enter into agreements or conventions with an outside State, an international organisation or a national of an outside State.

Such agreements or conventions shall be negotiated by the Commission in accordance with directives given by the Council and shall be concluded by the Commission with the approval of the Council given by the prescribed majority vote.

Nevertheless, agreements or conventions the implementation of which does not require action by the Council and can be carried out within the limits of the appropriate budget, shall be negotiated and concluded by the Commission, provided always that the Council is kept informed.

ARTICLE 102

Agreements or conventions concluded with an outside State, an international organisation or a national of an outside State to which, in addition to the Community, one or more Member States are parties may come into force only after all Member States concerned have notified the Commission that such agreements or conventions have become applicable under the terms of their respective national laws.

ARTICLE 103

Member States shall notify the Commission of any agreements or conventions they propose to enter into with an outside State, an international organisation or a national of an outside State, so far as such agreements or conventions fall within the scope of the present Treaty.

Should any proposed agreement or convention contain clauses likely to impede the application of the present Treaty, the Commission shall forward its comments to the State concerned within one month from the date on which it received such notification.

The State in question may not conclude the proposed agreement or convention until it has overcome the objections of the Commission or complied with the pronouncement of the Court of Justice, which shall give an urgent decision at its request as to the compatibility of the proposed clauses with the provisions of the present Treaty. The State in question may bring its

petition before the Court of Justice at any time after it has received the comments of the Commission.

ARTICLE 104

No individual or firm concluding or renewing an agreement or convention with an outside State, an international organisation or a national of an outside State, after the entry into force of the present Treaty, may invoke such agreement or convention to avoid complying with the obligations imposed upon it by the present Treaty.

Each Member State shall take all such measures as it considers necessary to give the Commission, at the latter's request, full information regarding agreements or conventions concluded after the entry into force of the present Treaty, and falling within the scope of the latter, by any individuals or firms with an outside State, an international organisation or a national of an outside State. The only object for which the Commission may require this information shall be to verify that such agreements or conventions do not contain clauses likely to impede the application of the present Treaty.

At the request of the Commission, the Court of Justice shall pronounce on the compatibility of such agreements or conventions with the provisions of the present Treaty.

ARTICLE 105

The provisions of the present Treaty may not be invoked to avoid the execution of agreements or conventions concluded, before its entry into force, by a Member State, an individual or a firm with an outside State, an international organisation or a national of an outside State, if such agreements or conventions have been communicated to the Commission at latest within thirty days of the entry into force of the present Treaty.

Nevertheless, an agreement or convention concluded during the period between the signature and the entry into force of the present Treaty, by an individual or firm with an outside State, an international organisation or a national of an outside State may not be invoked in opposition to the present Treaty if, in the opinion of the Court of Justice adjudicating at the request of the Commission, one of the motives of either of the parties in concluding such agreement or convention was to circumvent the provisions of the present Treaty.

ARTICLE 106

Member States which, before the entry into force of the present Treaty, shall have concluded agreements with outside States for co-operation in the field of atomic energy shall, in conjunction with the Commission, enter into the necessary negotiations with the outside States in question in order, so far as possible, to ensure the assumption by the Community of the rights and obligations arising out of such agreements.

Any new agreement resulting from such negotiation shall require the consent of the Member State or States parties to the aforesaid agreements, and also the approval of the Council, voting by the prescribed majority.

PART III

ORGANS

CHAPTER I

Organs of the Community

SECTION I—THE ASSEMBLY

[For Arts. 107-113 see Arts. 137-143 of the Economic Community Treaty above.]

ARTICLE 114

If a motion of censure concerning the operations of the Commission is tabled in the Assembly, the latter may decide thereon, by an open vote, only after not less than three days have elapsed from the tabling of the motion.

If the motion of censure is adopted by a two-thirds majority of the votes cast, representing a majority of the members of the Assembly, the members of the Commission shall resign their office in a body. They shall continue to deal with current business until they shall have been replaced in accordance with the provisions of Article 127.

SECTION II—THE COUNCIL

ARTICLE 115

The Council shall carry out its functions and exercise its powers of decision under the conditions laid down in the present Treaty.

It shall take all measures within the powers conferred upon it to co-ordinate the actions of Member States and the Community.

[For Arts. 116-123 see Articles 146-152, 154 of the Economic Community Treaty.]

SECTION III—THE COMMISSION

ARTICLE 124

With a view to ensuring the development of atomic energy within the Community, the Commission shall

supervise the application of the provisions of the present Treaty and of measures adopted by the organs of the Community in virtue of the said Treaty;

put forward recommendations or opinions in regard to matters covered by the present Treaty, in cases where such recommendations or opinions are explicitly provided for in the said Treaty or where the Commission considers them to be necessary;

enjoy independent powers of decision and share in the preparation of Council and Assembly documents, under the conditions laid down in the present Treaty;

exercise the powers conferred on it by the Council with a view to the execution of the regulations laid down by the latter.

[For Art. 125 see Article 156 of the Economic Community Treaty.]

ARTICLE 126

1. The Commission shall be composed of five members, of different nationalities, selected for their general competence in regard to the special purposes of the present Treaty and of unquestioned impartiality.

The number of members of the Commission may be altered by a unanimous vote of the Council.

Members of the Commission must be nationals of Member States.

[Remaining provisions of Article 126 are the same as those in Article 157 of the Economic Community Treaty, with the exception of reference to Article 129 of the present Treaty instead of Article 160 of the Economic Community Treaty.]

[For Art. 127 see Article 158 *ibid.*]

[Article 128 same as Article 159, *ibid.*, except for reference to Article 129 of present Treaty instead of Article 160 *ibid.*]

[For Art. 129 see Article 160 of the Economic Community Treaty.]

ARTICLE 130

The Chairman and the Vice-Chairman of the Commission shall be appointed from among members of the latter, for two years, following the same procedure as that laid down for the appointment of members of the Commission. They shall be re-eligible.

Except in the case of a complete change of membership, the appointment shall be made after consultation with the Commission.

In case of the resignation or death of the Chairman or Vice-Chairman, he shall be replaced for the remainder of his term of office, according to the procedure laid down in the first paragraph of the present Article.

[For Art. 131 see Article 162 of the Economic Community Treaty.]

ARTICLE 132

Decisions of the Commission shall be taken by a majority of the number of members provided for in Article 126.

No session of the Commission shall be valid in the absence of the quorum laid down in its Rules of Procedure.

ARTICLE 133

The Council may, by a unanimous vote, agree to the appointment, by the Government of a Member State, of an accredited representative to be responsible for ensuring permanent liaison with the Commission.

ARTICLE 134

1. There shall be set up, attached to the Commission, a Scientific and Technical Committee, with consultative status.

The Committee must be consulted in all cases laid down in the present Treaty and may be consulted in other cases, should the Commission consider it desirable.

2. The Committee shall be composed of twenty members appointed by the Council after consultation with the Commission.

Members of the Committee shall be appointed in their personal capacity for a term of five years and shall be eligible for reappointment. They may not be bound by any overriding mandate.

The Scientific and Technical Committee shall each year elect its Chairman and officers from among its own members.

ARTICLE 135

The Commission may hold any consultations and set up any study committees necessary to the discharge of its mission.

SECTION IV—THE COURT OF JUSTICE

[For Art. 136 see Article 164 of the Economic Community Treaty.]

[Article 137 same as Article 165 *ibid.*, with substitution of references in 3rd paragraph to Article 150 of present Treaty, and in 4th paragraph to Article 139 of present Treaty.]

[Article 138 same as Article 166 *ibid.*, with substitution of references in 2nd paragraph to Article 136 of present Treaty, and in 3rd paragraph to Article 139 of present Treaty.]

[For Arts. 139–143, see Articles 167–171 of the Economic Community Treaty.]

ARTICLE 144

The Court of Justice shall have powers of full jurisdiction in respect of:

(a) Appeals brought under Article 12, with a view to the determination of suitable conditions for the granting of licences or sub-licences by the Commission;

(b) Appeals brought by individuals or firms against penalties imposed on them by the Commission under Article 83.

ARTICLE 145

If the Commission considers that an individual or firm has committed a violation of the present Treaty in respect of which the provisions of Article 83 are not applicable, it shall invite the Member State to which such individual or firm belongs to impose penalties in respect of such violations under its national laws.

If the Member State concerned does not comply with this invitation within the period laid down by the Commission, the latter may submit the case to the Court of Justice with a view to establishing that such violation has been committed by the individual or firm in question.

[For Arts. 146-148 see Articles 173-175 of the Economic Community Treaty.]

[Article 149 the same as Article 176 *ibid.*, with substitution of reference in 2nd paragraph to Article 188 of the present treaty.]

[For Art. 150 see Article 177 of the Economic Community Treaty.]

ARTICLE 151

The Court of Justice shall be competent to hear cases relating to compensation for damage as provided for in the second paragraph of Article 188.

[For Arts. 152-155 see Articles 179, 181-183 *ibid.*]

[Article 156 the same as Article 184 *ibid.*, with substitution of reference to Article 146 of present Treaty.]

ARTICLE 157

Except where otherwise provided in the present Treaty, appeals lodged with the Court of Justice shall not have any staying effect. Nevertheless, if it considers that circumstances so require, the Court of Justice may order the suspension of the execution of the decision in issue.

ARTICLE 158

In any cases submitted to it, the Court of Justice may order such temporary measures as it may consider necessary.

ARTICLE 159

The judgments of the Court of Justice shall have executory force under the conditions laid down in Article 164.

[For Art. 160 see Article 188 of the Economic Community Treaty.]

CHAPTER II

Provisions Common to Several Institutions

[For Arts. 161-163 see Articles 189-191 of the Economic Community Treaty.]

[Article 164 the same as Article 192 *ibid.*, with omission of first paragraph of the latter.]

CHAPTER III

The Economic and Social Committee

ARTICLE 165

An Economic and Social Committee shall be set up with advisory functions.

The Committee shall consist of representatives of the different branches of economic and social life.

[For Arts. 166-168 see Articles 194-196 of the Economic Community Treaty.]

ARTICLE 169

The Committee may be subdivided into specialised sections. These sections shall operate within the framework of the general powers conferred upon the Committee. The specialised sections may not be consulted independently of the Committee.

There may also be set up within the Committee sub-committees for the purpose of drawing up draft opinions on specific matters or in specific fields for submission to the Committee.

The rules of procedure shall determine the methods of appointing specialised sections and sub-committees and the competence conferred upon them.

[For Art. 170 see Article 198 of the Economic Community Treaty.]

PART IV. FINANCIAL PROVISIONS

ARTICLE 171

1. Estimates must be drawn up for each financial year for all receipts and expenditures of the Community, apart from those of the Agency and Joint Enterprises, and must appear either in the operational budget or in the research and investment budget.

The receipts and expenditures of each budget must be balanced.

2. Estimates of the receipts and expenditures of the Agency, which will operate in accordance with commercial rules, shall appear in a separate statement.

The conditions governing the estimation, implemetation and verification of these receipts and expenditures shall be determined, with due regard for the statutes of the Agency, by the financial regulations provided for in Article 183.

3. The estimates of receipts and expenditures, together with the trading accounts and balance-sheets of Joint Enterprises for each financial year, shall be communicated to the Commission, the Council and the Assembly, as laid down in the statutes of those Enterprises.

ARTICLE 172

1. The receipts of the operational budget, apart from current revenue from other sources, shall comprise the financial contributions of Member States, fixed on the following proportionate scale:

Belgium	7.9
France	28
Germany	28
Italy	28
Luxembourg	0.2
Netherlands	7.9

2. The receipts of the research and investment budget, apart from any funds which may be received from other sources, shall comprise the financial contributions of Member States, fixed on the following proportionate scale:

Belgium	9.9
France	30
Germany	30
Italy	23
Luxembourg	0.2
Netherlands	6.9

3. The proportionate scales may be changed by a unanimous decision of the Council.

4. Loans for the financing of research or investment shall be contracted on terms settled by the Council voting as prescribed in Article 177, paragraph 5.

The Community may raise loans on the capital market of a Member State under the legal regulations applying to domestic loans or, in a Member State where such regulations do not exist, if the Member State and the Commission after mutual consultation agree upon the loan envisaged by the Commission.

The consent of the competent authorities in the Member State may not be refused unless serious disturbances in its capital market are to be feared.

ARTICLE 173

The financial contributions of Member States under Article 172 may be replaced, wholly or partly, by the yield of taxes collected by the Community in Member States.

To this end, the Commission shall submit to the Council proposals concerning the assessment of the tax, the method of fixing the rate, and the procedure for collection.

The Council may by a unanimous decision, taken after consulting the Assembly on the above proposals, draw up provisions which it would recommend Member States to adopt in accordance with their respective constitutional regulations.

ARTICLE 174

1. The expenditure appearing in the operational budget shall comprise:

- (a) administrative expenses; and
- (b) expenses connected with security control and health protection.

2. The expenditure appearing in the research and investment budget shall comprise:

- (a) expenditure incurred in the implementation of the Community's research programme;
- (b) any participation in the capital of the Agency and its investment expenditure;

- (c) expenditure involved in the equipment of teaching establishments; and
- (d) any participation in Joint Enterprises and certain joint operations.

ARTICLE 175

The expenditure entered in the operational budget shall be authorised for the duration of one financial year, unless any provisions to the contrary are contained in the regulations adopted under Article 183.

Subject to the conditions to be laid down in application of Article 183, any funds, other than those earmarked for staff costs, which are unexpended at the end of the financial year may be carried over, but not beyond the end of the following financial year.

Appropriations for running expenses shall be set out under different heads, according to type or purpose and subdivided, as far as necessary, in accordance with the regulations adopted under Article 183.

There shall be separate sections of the budget for expenditure in connection with the Assembly, the Council, the Commission and the Court of Justice, apart from the entry of certain joint expenses under a special head.

ARTICLE 176

1. Appropriations for research and investment, within the limits set by the agreed programmes or by decisions on expenditure, which under the present Treaty require the Council's unanimity, shall comprise:

- (a) budget appropriations for a special sector forming a separate unit and a coherent whole;
- (b) budget authorisations representing the maximum sum payable each year for covering commitments contracted under paragraph (a).

2. The bill-book of appropriations and authorisations shall be annexed to the corresponding draft budget proposed by the Commission.

3. Appropriations for research and investment shall be set out under different heads according to type or purpose of the expenditure and subdivided, as far as necessary, in accordance with the regulations adopted under Article 183.

4. Unexpended budget authorisations shall be carried over to the following financial year by a decision of the Commission, unless the Council decides otherwise.

ARTICLE 177

1. The financial year shall run from 1 January to 31 December inclusive.

2. Each of the institutions of the Community shall draw up provisional estimates of its administrative expenses. The Commission shall combine these estimates in a preliminary draft operational budget; to this it will attach its comments, which may include divergent estimates. It shall also draw up the preliminary draft of the research and investment budget.

Preliminary draft budgets must be laid before the Council by the Commission not later than 30 September of the year preceding the implementation of the budget.

The Council shall consult the Commission and, when appropriate, other institutions concerned, if it intends to depart from the preliminary drafts submitted.

3. The Council, voting with the prescribed majority, shall establish the draft budgets and shall then forward them to the Assembly.

The Assembly must have the draft budgets laid before it not later than 31 October of the year preceding their implementation.

The Assembly shall be entitled to propose to the Council changes in the draft budgets.

4. If, one month after receiving the draft budgets, the Assembly has either stated its approval or has failed to forward its comments to the Council, the draft budgets shall be considered as finally adopted.

If, within this period, the Assembly has proposed certain changes, the draft budgets, thus amended, shall be forwarded to the Council. The Council shall then discuss them with the Commission and, when appropriate, with the other institutions concerned, and shall finally approve the budgets by the prescribed majority vote, within the limits set by agreed programmes or by decisions on expenditure, which under the present Treaty require the Council's unanimity.

5. For the approval of the research and investment budget the votes of Members of the Council shall be weighted as follows:

Belgium	9
France	30
Germany	30
Italy	23
Luxembourg	1
Netherlands	7

Decisions shall be valid if supported by at least 67 votes.

ARTICLE 178

If, at the beginning of the financial year, the operational budget has not yet been approved, expenditure may be made on a monthly basis per section or other division, according to the provisions of the regulations adopted under Article 183, up to one-twelfth of the budget appropriations for the preceding financial year; but the amount thus made available to the Commission shall not exceed one-twelfth of the total appropriations shown in the draft of the budget in course of preparation.

If, at the beginning of the financial year, the research and investment budget has not yet been approved, expenditure may be made on a monthly basis per section or other division, according to the provisions of the regulations adopted under Article 183, up to one-twelfth of the appropriations corresponding to the annual estimates entered in the bill-book for budget authorisations previously approved.

The Council may, by decision of a prescribed majority and subject to the other conditions stipulated in paragraphs 1 and 2, authorise expenditure over and above one-twelfth, within the limits set by the agreed programmes

or by decisions on expenditure, which under the present Treaty require the Council's unanimity.

Member States shall pay every month, on a provisional basis and in accordance with the proportional scale adopted for the previous financial year, the amounts necessary to ensure implementation of the present Article.

[Articles 179 and 180 are the same as Articles 205 and 206 of the Economic Community Treaty, except that the former deal with budgets in the plural, and Article 179 refers to Article 183 of the present Treaty.]

ARTICLE 181

The budgets and statement mentioned in paragraphs 1 and 2 of Article 171 shall be drawn up in the accounting units fixed in accordance with the provisions of the financial regulations adopted under Article 183.

The financial contributions mentioned in Article 172 shall be made available to the Community by Member States in their own currency.

The available balances of these contributions shall be deposited with the Treasuries of Member States or with organizations designated by them. The value of funds, whilst on deposit, shall remain at the parity rate in force at the time of deposit in relation to the accounting unit mentioned in paragraph 1.

These funds may be invested under conditions to be decided by agreements concluded between the Commission and the Member State concerned.

ARTICLE 182

1. The Commission may, provided it notifies the competent authorities of the Member States concerned, transfer its holdings in the currency of any one Member State into the currency of another Member State, if this is necessary in order to enable such funds to be used for the purposes for which they are intended by the present Treaty. The Commission shall, however, refrain as far as possible from making such transfers if it possesses liquid or realisable funds in the currencies it needs.

2. The Commission shall communicate with each Member State through the authority designated by the State. For financial operations, it shall use the services of the bank of issue of the Member State concerned, or of some other financial institution approved by that State.

3. As regards expenditure to be made by the Community in currencies of countries outside the Community, the Commission shall submit to the Council, before the budgets are finally approved, a programme showing the receipts and expenditures to be effected in the different currencies.

This programme shall be approved by a prescribed majority decision of the Council. It may be amended in the course of the financial year by the same procedure.

4. Funds in currencies of countries outside the Community, when required in order to meet items of expenditure appearing in the programme mentioned in paragraph 3, shall be handed over to the Commission by Mem-

ber States according to the proportionate scales laid down in Article 172. The same scales shall be applied for the allocation to Member States of currencies of outside countries collected by the Commission.

5. The Commission may dispose freely of funds in the currencies of countries outside the Community obtained by loans raised in those countries.

6. The exchange arrangements set out in the foregoing paragraphs may be made wholly or partly applicable to the Agency and to Joint Enterprises and may, if necessary, be adapted to their operational needs by unanimous decision of the Council, taken on a proposal by the Commission.

[For Art. 183 see Article 209 of the Economic Community Treaty.]

PART V. GENERAL PROVISIONS

[For Arts. 184–191 see Articles 210–213, 215–218 of the Economic Community Treaty.]

ARTICLE 192

Member States shall take all general or special measures necessary to secure execution of the obligations arising out of the present Treaty or resulting from instruments enacted by the Community's institutions. They shall help the Community in the fulfilment of its mission.

They shall abstain from any measures likely to jeopardise achievement of the aims of the present Treaty.

[For Art. 193 see Article 219 of the Economic Community Treaty.] ° ° °

ARTICLE 194

1. The members of the Community's institutions, members of committees, officials and agents of the Community, and any other persons whose functions or whose public or private relations with the institutions or organs of the Community or with Joint Enterprises, make it necessary for them to take or receive communication of facts, information, knowledge, documents or matters kept secret under provisions adopted by a Member State or by an institution of the Community, shall be required, even after termination of those functions or relations, to keep them secret from any unauthorised person and from the public.

Each Member State shall regard any breach of this obligation as a violation of its protected secrets, falling, as regard both substance and jurisdiction, under the provisions of its own laws applying to attacks on the security of the State or to the divulging of professional secrets. It shall proceed against every person guilty of such a violation within its jurisdiction at the request of any Member State concerned or of the Commission.

2. Each Member State shall communicate to the Commission all provisions regulating in its territories the classification and secrecy of information, knowledge, documents or matters relating to the field of application of the present Treaty.

The Commission shall ensure that these provisions are made known to the other Member States.

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Each Member State shall take all appropriate steps to facilitate the gradual establishment of the fullest and most uniform possible system of protection for official secrets. The Commission may issue any recommendations to this end after consulting with the Member States concerned.

3. The institutions of the Community and their organs, and also Joint Enterprises, must apply the provisions regarding the protection of official secrets which are in force in the territory in which each of them is situated.

4. Any authorisation to receive communication of facts, information, documents or matters relating to the field of application of the present Treaty and classified as official secrets, granted either by an institution of the Community or by a Member State to a person operating within the field of application of the present Treaty shall be recognised by every other institution and every other Member State.

5. The provisions of the present article shall not prevent the application of special provisions resulting from agreements concluded between a Member State and an outside State or an international organisation.

ARTICLE 195

The institutions of the Community, the Agency and Joint Enterprises must, in the application of the present Treaty, respect conditions imposed with regard to access to mineral ores, raw materials, and special fissionable materials, by national regulations enacted for reasons of public order or public health.

ARTICLE 196

For the purposes of the present Treaty and in the absence of conflicting provisions therein:

(a) the term "individual" shall denote any physical person all or some of whose activities in the territories of Member States come within the sphere defined in the corresponding section of the Treaty;

(b) the term "firm" shall denote any enterprise or body all or some of whose activities are exercised under the same conditions, whatever may be its public or private legal status.

ARTICLE 197

For the purposes of the present Treaty:

1. The term "special fissionable materials" shall denote plutonium 239, uranium 233, uranium enriched with uranium 235 or 233; any product containing one or more of the above isotopes and such other fissionable materials as shall be defined by the Council, voting by the prescribed majority on a proposal of the Commission; the term "special fissionable materials" shall not, however, apply to raw materials.

2. The term "uranium enriched with uranium 235 or 233" shall denote uranium containing either uranium 235 or uranium 233, or both these isotopes, in such quantity that the ratio between the sum of these two isotopes

and isotope 238 exceeds the ratio between isotope 235 and isotope 238 in natural uranium.

3. The term "raw materials" shall denote uranium containing the mixture of isotopes found in nature, uranium whose content of uranium 235 is below the normal, thorium, all the materials mentioned above in the form of metal, alloys, chemical compounds or concentrates, any other material containing one or more of the above-mentioned substances at degrees of concentration determined by the Council, voting by the prescribed majority on a proposal of the Commission.

4. The term "mineral ores" shall denote any ore containing, in degrees of average concentration determined by the Council, voting by the prescribed majority on a proposal of the Commission, substances from which the raw materials as defined above can be obtained by appropriate chemical and physical treatment.

ARTICLE 198

In the absence of contrary provisions, the stipulations of the present Treaty shall apply to the European territories of Member States, and to non-European territories within their jurisdiction.

They shall apply also to European territories for whose foreign relations a Member State is responsible.

[For Arts. 199-202 see Articles 229-231, 233 of the Economic Community Treaty.]

ARTICLE 203

If action by the Community appears necessary in the pursuit of one of the purposes of the Community, in cases where the present Treaty has not provided for the powers required for this purpose, the Council, voting unanimously on a proposal by the Commission, and after consultation with the Assembly, shall take the appropriate steps.

[For Arts. 204 and 205 see Articles 236 and 237 of the Economic Community Treaty.]

[Article 206 is the same as Article 238, with substitution of reference to Article 204 of the present treaty.]

[For Arts. 207 and 208 see Articles 239 and 240 of the Economic Community Treaty.]°

PART VI. PROVISIONS TO COVER THE INITIAL PERIOD

SECTION I—ESTABLISHMENT OF THE INSTITUTIONS OF THE COMMUNITY

[For Arts. 209-212 see Articles 241-244 of the Economic Community Treaty.]

ARTICLE 213

The Commission shall enter upon its duties and assume the responsibilities entrusted to it by the present Treaty as soon as its members are appointed.

Immediately on entering upon its duties, the Commission shall undertake the studies and establish the contacts with Member States, firms, workers and consumers which are necessary for obtaining an over-all view of the position of nuclear industries in the Community.

The Commission shall report on the subject to the Assembly within six months.

[Article 214 is the same as Article 246 of the Economic Community Treaty, except that the former refers to budgets in the plural and, in paragraph 3, to Article 186 of the present treaty.]

SECTION II—PRELIMINARY PROVISIONS FOR IMPLEMENTING THE TREATY

ARTICLE 215

1. The initial research and teaching programme which appears as Annex V * of the present Treaty and on which not more than 215 million E.P.U. accounting units may be spent, unless the Council unanimously decide otherwise, must be carried out within five years of the entry into force of the Treaty.

2. The breakdown of expenditure on the implementation of this programme is shown under major items in Annex V, as an indication.

The Council, voting by the prescribed majority on the proposal of the Commission, may amend this programme.

ARTICLE 216

The Commission's proposals concerning the way in which the institution at university level referred to in Article 9 shall operate, shall be transmitted to the Council within one year of the entry into force of the Treaty.

ARTICLE 217

The security regulations provided for in Article 24 relating to the different classifications of secret information applicable to the disclosure of information, shall be drawn up by the Council within six months of the entry into force of the Treaty.

ARTICLE 218

The basic standards shall be determined in accordance with the provisions of Article 31 within one year of the entry into force of the Treaty.

ARTICLE 219

The laws and regulations for the purpose of safeguarding the health of workers and of the rest of the population in the territories of Member States against the dangers resulting from ionising radiation shall, in conformity with Article 33, be communicated by the said States to the Commission within three months of the entry into force of the Treaty.

* Not printed here.

ARTICLE 220

The Commission's proposals for the Agency's Statutes, referred to in Article 54, shall be transmitted to the Council within three months of the entry into force of the Treaty.

SECTION III—TRANSITIONAL PROVISIONS

ARTICLE 221

The provisions of Articles 14 to 23 inclusive and of Articles 25 to 28 inclusive shall apply to patents, provisionally protected claims and registered models, and also to applications for patents and registered models filed before the entry into force of the Treaty, under the following conditions:

1. In applying the time-limit provided for in Article 17, paragraph 2, account must be taken, in favour of the owner, of the new situation arising from the entry into force of the Treaty.

2. With regard to the communication of a non-secret invention, if either or both of the periods of three months and eighteen months allowed under Article 16 have expired at the date when the Treaty enters into force, a further period of six months shall begin to run from that date.

If these periods, or one of them, are unexpired at that date, they shall be extended for six months as from the date of their normal expiration.

3. The same provisions shall apply in regard to the disclosure of a secret invention, under the terms of Articles 16 and 25, paragraph 1, except that in such cases the new period, or the extension of a current period, shall be deemed to begin on the date of the entry into force of the security regulations referred to in Article 24.

ARTICLE 222

During the period between the date of the entry into force of the Treaty and the date, to be fixed by the Commission, when the Agency assumes its functions, agreements and conventions for the supply of ores, raw materials, or special fissionable materials shall not be concluded or renewed without the prior approval of the Commission.

The Commission shall not approve the conclusion or renewal of agreements and conventions which it considers likely to interfere with the implementation of the present Treaty. It may, in particular, make its approval conditional upon the inclusion of clauses in these agreements and conventions enabling the Agency to become a party to their implementation.

ARTICLE 223

Notwithstanding the provisions of Article 60, and in order to take account of work and studies already in progress, supplies for reactors in the territory of a Member State which may become critical before the expiry of a period of seven years as from the date of the entry into force of the Treaty, shall be granted priority for a maximum period of ten years as from that date in regard both to ores and raw materials originating in the

territory of that State and to raw materials or special fissionable materials forming the subject of a bilateral agreement concluded before the entry into force of the Treaty and communicated to the Commission in accordance with the provisions of Article 105.

The same priority shall be granted during the same period of ten years in regard to supplies for all isotope separation factories, whether or not Joint Enterprises, which begin to operate in the territory of a Member State within seven years of the entry into force of the Treaty.

The Agency shall conclude corresponding contracts after the Commission has verified that the conditions for granting the priority right are fulfilled.

[For Final Provisions and signatures see the Economic Community Treaty.]

CONVENTION RELATING TO CERTAIN INSTITUTIONS COMMON TO THE EUROPEAN COMMUNITIES

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF THE ITALIAN REPUBLIC, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS,

ANXIOUS to avoid a multiplicity of institutions for discharging similar functions within the European Communities they have set up,

HAVE DECIDED to create for these Communities certain single institutions and for this purpose have appointed as their Plenipotentiaries:

[Here follow names of plenipotentiaries as listed above, p. 866.]

WHO, after having exchanged their full powers, found in good and due form,

HAVE AGREED upon the following provisions:

PART I—THE ASSEMBLY

ARTICLE 1

The powers and competence which the Treaty establishing the European Economic Community on the one hand, and the Treaty establishing the European Atomic Energy Community on the other, confer upon the Assembly shall be exercised, under the conditions respectively laid down in those Treaties, by a single Assembly composed and appointed as provided for both in Article 138 of the Treaty establishing the European Economic Community and in Article 108 of the Treaty establishing the European Atomic Energy Community.

ARTICLE 2

1. From the time of its entry upon its duties, the single Assembly referred to in the foregoing Article shall replace the Common Assembly provided for in Article 21 of the Treaty establishing the European Coal and

Steel Community.* It shall exercise the powers and competence devolving upon the Common Assembly under that Treaty, in conformity with the provisions thereof.

2. To this end, Article 21 of the Treaty establishing the European Coal and Steel Community shall, from the date of the entry upon its duties of the single Assembly mentioned in the foregoing Article, be abrogated and replaced by the following provisions:

ARTICLE 21

1. The Assembly shall consist of delegates whom the parliaments shall be called upon to appoint from among their own membership according to the procedure determined by each Member State.

2. The number of delegates is fixed as follows:

Belgium	14
France	36
Germany	36
Italy	36
Luxembourg	6
Netherlands	14

3. The Assembly shall draw up plans for election by direct universal suffrage according to a uniform procedure in all the Member States.

The Council, voting unanimously, shall draw up the provisions of which it shall recommend the adoption by Member States in conformity with their respective constitutional rules.

PART II—THE COURT OF JUSTICE

ARTICLE 3

The powers conferred upon the Court of Justice by the Treaty establishing the European Economic Community, on the one hand, and the Treaty establishing the European Atomic Energy Community, on the other, shall be exercised, under the conditions respectively laid down in these Treaties, by the single Court of Justice composed and appointed as provided for both in Articles 165 to 167 (inclusive) of the Treaty establishing the European Economic Community and in Articles 137 to 139 (inclusive) of the Treaty establishing the European Atomic Energy Community.

ARTICLE 4

1. From the time of its entry upon its duties, the single Court of Justice mentioned in the foregoing Article shall replace the Court provided for in Article 32 of the Treaty establishing the European Coal and Steel Community. It shall exercise the powers conferred upon that Court by the said Treaty, in conformity with the provisions thereof.

The President of the single Court of Justice referred to in the foregoing Article shall exercise the powers conferred by the Treaty establishing the

* Printed in 46 A.J.I.L. Supp. 107 at 114-115 (1952).

European Coal and Steel Community upon the President of the Court provided for in that Treaty.

2. To this end, on the date of the entry upon its duties of the single Court of Justice referred to in the foregoing Article,

(a) Article 32 of the Treaty establishing the European Coal and Steel Community * shall be abrogated and replaced by the following provisions:

ARTICLE 32

The Court shall consist of seven judges.

The Court shall sit in plenary session. Nevertheless, it may set up within itself divisions, each composed of three or five judges, either for the purpose of conducting preliminary examinations or for the purpose of deciding certain categories of cases under conditions to be laid down in special regulations.

The Court shall, however, always sit in plenary session to hear cases submitted to it by a Member State or by one of the organs of the Community, or to deal with interlocutory questions submitted to it under Article 41.

Should the Court so request, the Council may, by a unanimous vote, increase the number of judges and make the consequent amendments to the second and third paragraphs of the present Article, and to the second paragraph of Article 32ter.

ARTICLE 32 (a)

The Court shall have the assistance of two advocates-general.

The function of the advocate-general shall be to present publicly and with complete impartiality and independence oral reasoned arguments on the cases submitted to the Court, in order to assist the latter in the performance of its duties as defined in Article 31.

Should the Court so request, the Council may, by a unanimous vote, increase the number of advocates-general and make the consequent amendments to the third paragraph of Article 32ter.

ARTICLE 32 (b)

The judges and the advocates-general shall be chosen from among persons of unquestioned impartiality who fulfil the conditions required in their respective countries for the holding of the highest legal offices or who are legal experts of wide repute. They shall be appointed for a term of six years by agreement between the governments of Member States.

A proportion of the judges shall retire every three years, three and four judges respectively retiring alternately. The three judges whose terms of office expire at the end of the first three-year period shall be chosen by lot.

A proportion of the advocates-general shall retire every three years. The advocate-general whose term of office expires at the end of the first three-year period shall be chosen by lot.

The retiring judges and advocates-general shall be eligible for reappointment.

The judges shall elect the President of the Court from among their own number for a period of three years. The President shall be eligible for reappointment.

* *Lq. cit.* at 117.

ARTICLE 32 (c)

The Court of Justice nominates its clerk and lays down the relevant statutes.

(b) The provisions of the Protocol in the Code of the Court of Justice annexed to the Treaty establishing the European Coal and Steel Community shall be abrogated so far as they are contrary to Articles 32 to 32 (c) inclusive of that Treaty.

PART III—THE ECONOMIC AND SOCIAL COMMITTEE

ARTICLE 5

1. The functions entrusted to the Economic and Social Committee by the Treaty establishing the European Economic Community, on the one hand, and the Treaty establishing the European Atomic Energy Community, on the other, shall be exercised, under the conditions respectively laid down in those Treaties, by a single Economic and Social Committee composed and appointed as provided for both in Article 194 of the Treaty establishing the European Economic Community and in Article 166 of the Treaty establishing the European Atomic Energy Community.

2. The single Economic and Social Committee referred to in the foregoing paragraph shall comprise a specialized section, and may comprise competent sub-committees in fields or for questions covered by the Treaty establishing the European Atomic Energy Community.

3. The provisions of Articles 193 and 197 of the Treaty establishing the European Economic Community shall apply to the single Economic and Social Committee mentioned in paragraph 1 of the present Article.

PART IV—THE FINANCING OF THESE INSTITUTIONS

ARTICLE 6

The operational expenses of the single Assembly, the single Court of Justice and the single Economic and Social Committee shall be divided equally between the Communities concerned.

The methods of applying the present Article shall be determined by agreement between the competent authorities of each Community.

FINAL PROVISIONS

ARTICLE 7

The present Convention shall be ratified by the High Contracting Parties in conformity with their respective constitutional rules. The instruments of ratification shall be deposited with the Government of the Italian Republic.

The present convention shall enter into force on the date on which the Treaty establishing the European Economic Community and the Treaty

establishing the European Atomic Energy Community shall have come into force.

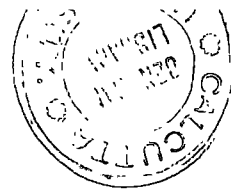
ARTICLE 8

The present Convention, drawn up in a single copy, in German, French, Italian and Dutch, all four texts being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which shall transmit a certified true copy to each of the Governments of the other signatory States.

IN FAITH WHEREOF, the undersigned Plenipotentiaries have placed their signatures at the end of the present Convention.

Done at Rome, on the twenty-fifth day of March in the year one thousand nine hundred and fifty-seven.

[For signatures, see page 937 above.]



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[Abbreviations: *AJIL*, American Journal of International Law; *ASIL*, American Society of International Law; *BR*, Book Review; *CN*, Notes and Comments; *Ed*, Editorial Comment; *I.C.J.*, International Court of Justice; *I.L.C.*, International Law Commission; *JD*, Judicial Decisions; *LA*, Leading Article]

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